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In The
Supreme Court of the United States

JAMES ALFORD,
DESCHUTES COUNTY DEPUTY SHERIFF,

Petitioner,

v.

SARAH GREENE, personally and as
next friend for S.G., a minor, and K.G., a minor,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a federal constitutional question of exceptional importance concerning the scope of the Fourth Amendment's protections when applied to interviews of suspected child abuse victims at public schools. Here, child protective services and a local law enforcement agency received a report that a nine-year old girl was being sexually abused by her father. Based upon this report, a child protective services caseworker and a deputy sheriff interviewed the girl at her public school without first obtaining a warrant or parental consent. Splitting with the Fifth Circuit, which had held under similar circumstances that the traditional warrant/warrant exception analysis sets too high a threshold when investigating allegations of child abuse, the Ninth Circuit held the interview violated the girl's Fourth Amendment right to be free from "unreasonable" seizures absent a warrant, court order, exigent circumstances, or parental consent. In so holding, the Ninth Circuit rejected the balancing-of-interests approach first established in *Terry v. Ohio* to assess whether detentions not amounting to an arrest are reasonable under the Fourth Amendment. It concluded instead that the Fourth Amendment demanded the application of the more restrictive standard of a warrant or an exception to the warrant requirement to interviews of this type.

I. Does the Fourth Amendment require a warrant, a court order, parental consent, or exigent circumstances before law enforcement and child welfare officials may conduct a temporary seizure and interview at a public school of a child whom they reasonably suspect was being sexually abused by her father?

PARTIES TO THE PROCEEDING

Petitioner is Deschutes County Deputy Sheriff James Alford. Other interested parties include the State of Oregon Department of Human Services representing Bob Camreta, the DHS caseworker, who has filed a separate Petition for Writ of Certiorari. The Bend LaPine School District and Terry Friesen, a school district employee, were defendants in the United States District Court, who prevailed at the U.S. Court of Appeals, Ninth Circuit, and are not appealing. Respondent is Sarah Greene who brought the lawsuit on her own behalf and on behalf of her minor children.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Deschutes County Deputy Sheriff James Alford respectfully petitions for a writ of certiorari to issue in order to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") is published at 588 F.3d 1011 (9th Cir. 2009). The Opinion and Order of the United States District Court for the District of Oregon ("District Court") is reported at 2006 WL 758547.

JURISDICTION

The judgment of the Ninth Circuit was entered on December 10, 2009. Petitioner received an extension of time to file a Petition for Rehearing/Rehearing En Banc on December 22, 2009. The Ninth Circuit denied petitioner's timely Petition Rehearing/Rehearing En Banc on March 1, 2010.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). District Court jurisdiction was invoked pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit or equity, or other proper proceeding for redress,. . . .

STATEMENT OF THE CASE

A. Proceedings Below

S.G., a minor, nine years old at the time of the underlying events, sued in District Court alleging

that Defendants caseworker Bob Camreta ("Camreta") and Deputy Sheriff James Alford ("Alford") had unreasonably seized her at a public school in violation of the Fourth Amendment. S.G.'s claim arose from a two-hour interview conducted by Camreta and Alford in a school conference room. The interview took place after Camreta had received credible information suggesting S.G.'s father had sexually abused her and her five-year old sister. The District Court granted Camreta and Alford summary judgment on this claim, ruling that although S.G. had been seized for purposes of the Fourth Amendment, no constitutional violation had occurred because the seizure was reasonable under the circumstances.[1]

The District Court found the Tenth Circuit's analysis in *Doe v. Bagan*, 41 F.3d 571 (10th Cir. 1994) dispositive. *Bagan* considered whether the seizure of a nine-year old boy by a social services caseworker at a public school to interview him about his suspected sexual abuse of another child violated the Fourth Amendment. *Id.* at 573-74. Applying the reasonableness test of *Terry v. Ohio*, 392 U.S. 1 (1968), as incorporated in *New Jersey v. T.L.O.*, 469 U.S. 325

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[1] Whether S.G. was seized in these circumstances is not at issue in this petition. However, as case law from several of the circuits have made clear, not all interviews of suspected child abuse victims in public schools by law enforcement or child protective workers amount to seizures under the Fourth Amendment.

(1985),[2] *Bagan* held no constitutional violation had occurred. *Id.* at 574 n. 3. It reasoned the seizure "was justified at its inception because a victim of child abuse had identified [the boy] as her abuser," and "a ten-minute interview with a social services caseworker was reasonably related in scope to determining [the boy]'s role in the incident." *Id.*

Applying the *Terry/T.L.O.* analysis to the facts of the present case, the District Court concluded the seizure of S.G. was reasonable at its inception, in that it was supported by a reasonable suspicion that she had been sexually abused by her father, and was reasonable in scope, in that the circumstances justified the interview's length. The District Court ruled alternatively that, even if the seizure was unconstitutional, qualified immunity protected Camreta and Alford from liability.

On appeal, the Ninth Circuit rejected the District Court's conclusion as to the Fourth Amendment violation, but agreed with its qualified immunity ruling. Accordingly, the Ninth Circuit affirmed the District Court as to its grant of summary judgment to Alford and Camreta, but reversed the District Court's summary judgment ruling as to the Fourth Amendment violation. This petition is concerned solely with

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[2] In *T.L.O.*, this Court held that a school official's warrantless, in-school search of a student's purse, based on a reasonable suspicion that it contained evidence of a violation of the law or a school rule, did not violate the Fourth Amendment. 469 U.S. at 340-41.

the Ninth Circuit's substantive Fourth Amendment analysis, and qualified immunity is not at issue here.

The Ninth Circuit's holding relied on this Court's decision in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and concluded the *Terry/T.L.O.* "balancing" test does not apply to in-school seizures conducted with law enforcement involvement.[3] *See Greene v. Camreta*, 588 F.3d 1011, 1026-30 (9th Cir. 2009). The panel reasoned that *Ferguson* barred the application of the *Terry/T.L.O.* standard where "law enforcement personnel or purposes" are too deeply involved in a seizure. *Id.* at 1027. Thus, it held "the general law of search warrants applies to child abuse investigations" where law enforcement is involved and, absent a warrant or court order, exigent circumstances, or parental consent, S.G.'s interview was unconstitutional. *Id.* at 1030.

B. Statement of Facts

Nimrod Greene ("Nimrod") was arrested on February 12, 2003, for the suspected sexual abuse of

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[3] The "special needs" doctrine, first coined by Justice Blackmun in his concurring opinion in *T.L.O.*, *see* 469 U.S. at 351 (Blackmun, J., concurring), refers to the analysis used by this Court in a long line of cases, beginning with *Camara v. Municipal Court*, 387 U.S. 523 (1967), in which this Court has relaxed the traditional Fourth Amendment requirements of probable cause and a warrant where "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." The Ninth Circuit summarizes this Court's "special needs" cases in its opinion. *See, Greene*, at 1026, n. 10.

F.S., a seven-year old boy. F.S. was the son of Nimrod's employer. Nimrod and his wife Sarah were acquaintances of F.S.' parents, and had often socialized together. Nimrod's arrest was based on statements made by F.S. to his parents and later to investigators in which he alleged Nimrod had sexually assaulted him on two occasions. The second alleged assault occurred in F.S' home while Nimrod was visiting, after F.S.' parents had left him alone with Nimrod. Based on these allegations, Nimrod was arrested, charged with two counts of Sexual Abuse I, and lodged in the Deschutes County Adult Jail.[4]

During the investigation, F.S.' mother informed investigators she believed Nimrod was also sexually abusing his two daughters, S.G. and K.G., who were nine and five years old, respectively, at the time. She explained that Sarah, Nimrod's wife, had "talked to her about how she doesn't like the way Nimrod makes [S.G. and K.G.] sleep in his bed when he is intoxicated and she doesn't like the way he acts when they are sitting on his lap." F.S.' father also told officers that "Nimrod himself has made some type of prior comment about how his wife Sarah was accusing him of molesting his daughters and Sarah reportedly doesn't like the girls laying in bed with Nimrod when he has been drinking."

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[4] "A person commits the crime of sexual abuse in the first degree when that person subjects another person to sexual contact . . . and the victim is less than 14 years of age." Or. Rev. Stat. § 163.427(1)(a).

On February 20, 2003, while Nimrod remained incarcerated, the Oregon Department of Human Services ("DHS"), the Oregon agency responsible for investigating allegations of child abuse and implementing protection plans for abused children, learned of the allegations against Nimrod by F.S' parents. DHS assigned Camreta to assess the safety of S.G. and K.G.

On Friday, February 21, 2003, Camreta learned Nimrod had been released on bail and was home having unsupervised contact with his young daughters. Based on his experience and training, Camreta knew child sex offenders often act on impulse and often direct those impulses against their own children. Hence, Camreta became concerned for the safety of S.G. and K.G.

On Monday, February 24, 2003, Camreta commenced an initial assessment as to whether S.G. and/or K.G. had been sexually abused. He knew where S.G. attended school and he knew it was in session. Believing the school was an appropriate environment to help make S.G. feel safe, and in order to conduct the interview away from the potential influence of her parents or other distractions, Camreta decided to interview S.G. that day.[5] He did not contact S.G.'s parents before conducting the interview.[6]

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[5] Oregon law expressly permits DHS workers to interview a child at school "when the worker believes it will be the best environment in which to make contact with the child." Or. Admin. R. 413-015-0610.

[6] While a school administrator must be notified of such an interview, Oregon law does not always require notice to the

(Continued on following page)

Before going to the school, Camreta requested the assistance of the Deschutes County Sheriff. Oregon law encourages coordination between child protection workers and law enforcement officials when interviewing alleged child abuse victims in order to minimize the number of interactions among alleged victims, child protective services, and law enforcement.[7] Deputy Alford was dispatched to meet Camreta at the school to assist with S.G.'s interview.[8]

Upon arrival, Alford and Camreta met with a school counselor and asked to interview S.G. privately. The counselor consented, removed S.G. from her classroom, and escorted her to meet with Camreta and Alford in a large conference room adjacent to the school's administrative offices. She introduced the two men to S.G. and left. At the time of the interview, Alford was in his uniform, displaying his badge and a visible, holstered firearm.

Once in the room, S.G. sat down at a table with Camreta, who conducted the interview. The interview

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child's parents. *See* Or. Rev. Stat. § 419B.045 (requiring notice to the school administrator, but not requiring any notice to a child's parents) and Or. Admin. R. 413-015-0420(1)(G) (requiring the DHS worker to conduct the interview outside the presence of the parents where a parent is the alleged perpetrator).

[7] *See* Or. Admin. R. 413-015-0415(5)(G)(iv).

[8] "Upon receipt of an oral report of child abuse, the Department of Human Services or the law enforcement agency shall immediately . . . cause an investigation to be made to determine the nature and cause of the abuse of the child." Or. Rev. Stat. § 419B.020(1)(a).

lasted no more than two hours.[9] Before discussing the allegations against her father, Camreta attempted to establish a rapport with S.G., and spoke with her on subjects such as school, where she had lived during her life, her cats and her homework. Eventually, S.G. began to open up to Camreta about her father's alleged abuse, and after some time provided him with the following information:

> "When he drinks he tries to do it," meaning "he tries to touch me somewhere in my private parts. Then I go to my room and lock the door."
>
> The last incident occurred "just last week" on the outside of her clothing and she had tried to tell him to stop.
>
> Nimrod stopped the private part touching "yesterday because he isn't going to drink anymore."
>
> The touching of private parts started when she was three.
>
> The touching involved the chest and buttock areas, outside of her clothing. Her father sometimes "mumbled during the touching."

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[9] The parties dispute the length of the interview. According to Camreta and Alford, the interview lasted only 45 to 60 minutes. S.G. claimed the interview lasted closer to two hours. Because this issue arose at summary judgment, the Ninth Circuit viewed the facts in the light most-favorable to the non-moving party and assumed the interview lasted two hours.

> S.G.'s mother knew about the touching. Her mother had said within the last couple of days that "she had to deal with my dad," and the touching was "one of our secrets," with her little sister, K.G.

S.G.'s statements, coupled with the reports of F.S. and his parents, led Camreta to believe S.G. had been sexually abused by Nimrod.

While Camreta conducted the interview, Alford did not ask S.G. any questions. According to S.G., Alford "just sat there," and never participated in the interview. She indicated she believed she could trust Alford and that he did nothing to make her feel differently. Neither Camreta nor Alford ever touched or threatened S.G. S.G. acknowledged Alford was always nice to her at the interview, that she trusted him, and that he never did anything to frighten her. She also acknowledged it was common for police officers to be present at school, and she was comfortable in their presence.

When Camreta completed the interview, he contacted the counselor. It was near the end of the school day, and he and Alford wanted to make certain S.G. would catch her bus to return home. The counselor retrieved S.G. and they left.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

A. The Ninth Circuit's Holding That The *Terry/T.L.O.* "Reasonableness" Standard Did Not Apply To An In-School Interview Of A Student At A Public School Decided An Important Federal Question That Should Be Settled By This Court.

As the Ninth Circuit recognized, this case presents a Fourth Amendment question of exceptional importance. *See Greene, supra,* 588 F.3d at 1015-16, 21 ("[T]he constitutional standards governing the in-school seizure of a student who may have been abused by her parents are of great importance.") Child abuse unquestionably poses an immense problem throughout the states and, as observed by the Ninth Circuit, the number of child abuse investigations performed by state and local agencies is "staggering." *Id.* at 1015 (citing a U.S. Department of Health and Human Services report showing that, in 2007 alone, state and local agencies investigated 3.2 million reports of child abuse or neglect) (citations omitted).

This problem is compounded by the fact that nearly 80 percent of the perpetrators of child abuse are parents.[10] Because child sex abuse is a crime which occurs in secret against the defenseless, it is

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[10] U.S. Department of Health & Human Services, Administration for Children and Families (2007), at http://www.acf.hhs.gov/programs/cb/pubs/cm07/chapter5.htm.

highly unlikely that proof of such horrific misconduct can be developed in most cases without access to the victim. In instances where the parent is the alleged abuser, voluntary parental consent to question the victim is also highly unlikely. Further, the fact that consent has been sought by investigators to speak with the alleged victim frequently provides a parent the opportunity to dissuade the child from answering questions or to otherwise influence the child before an interview can take place. Several courts have recognized that abused children will often recant as a result of familial pressures. *See, e.g., U.S. v. Butterfly,* 182 F.3d 928 (9th Cir. 1999); *U.S. v. George,* 960 F.2d 97, 101 (9th Cir. 1992); *U.S. v. Provost,* 969 F.2d 617, 621 (8th Cir. 1992). *See also, State v. Storch,* 612 N.E.2d 305, 315 (Ohio 1993) ("Child abuse victims, susceptible to parental influence, are likely to change testimony. . . .") For this reason, investigative interviews of suspected child abuse victims almost always occur before government officials are able to develop "probable cause" to believe the abuse has occurred

In Oregon, as in the majority of states,[11] child protective agencies and law enforcement personnel are required to coordinate their efforts and cooperate in child abuse investigations.[12] Thus, caseworkers

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[11] *See, e.g.,* NDAA's AMERICAN PROSECUTORS RESEARCH INSTITUTE, MULTIDISCIPLINARY/MULTI-AGENCY CHILD PROTECTION TEAM STATUTES, http://www.ndaa.org/pdf/ncpaca-statute-multidisciplinary_nov_08.pdf

[12] *See, e.g.,* Or. Rev. Stat. §§ 418.747, 418.783, and 418.784.

from DHS work closely with local law enforcement agencies in a multidisciplinary approach to investigate suspected child abuse. This approach encourages law enforcement officers and DHS caseworkers, whenever possible, to jointly attend investigative interviews of suspected child abuse victims such as S.G.'s interview in this case.[13] The primary reason for this agency coordination between agencies in the context of child interviews is to minimize the trauma caused by subjecting a child to multiple interview sessions concerning alleged abuse. Repeated questioning of abused children has been described by several courts and commentators as a "second victimization," where the suspected victim is subjected to multiple interviews requiring repeated descriptions of the abuse.[14] In a recent case, Dr. Catherine Dixon, the Clinical Director of the Mississippi Children's Advocacy Center in Jackson explained "by coordinating the multiagency response to child abuse, and by designating a forensic interviewer, children are spared the additional stress and better information is obtained, inevitably leading to better decision-making. And better decision-making positively impacts child protection and prosecution outcomes." *Kazery v. State*, 995 So.2d

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[13] Or. Admin. R. 413-015-0415(5)(G)(iv) ("When the CPS worker and the [law enforcement officer] must each interview a child, it is preferable to coordinate the interviews to reduce the number of interactions with the child.").

[14] John E.B. Myers, *The Legal Response to Child Abuse: In the Best Interest of the Children?*, 24 J. Fam. L. 149, 182-84 (1985).

827 (Miss. App. 2008). Numerous states other than Oregon explicitly recognize the need for such coordination when interviewing children in these investigations.[15]

Here, the Ninth Circuit held that a DHS caseworker and a deputy sheriff violated the Fourth Amendment when, without a warrant, court order, exigent circumstances, or parental consent, they jointly interviewed a nine-year old girl at her public school concerning suspected sexual abuse by her father. This decision essentially invalidates what had been a routine investigative technique used by law enforcement and child protection agencies not only in

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[15] *See, e.g.*, Alabama, Ala. Code § 15-1-2(a) [reasonable limits on the number of interviews a victim of sexual abuse must submit to]; California, Cal. Penal Code §§ 11166.3, subd. (a) [requirement of coordination among agencies in child abuse investigations] and 13517 [procedures to minimize the number of interviews of children]; Connecticut, Conn. Gen. Stat. Ann. 17A-101H [requiring coordination of investigatory activities to limit number of interviews]; Florida, Fla. Stat. Ann. Ch. 914.16 [reasonable limits on number of interviews of children]; Hawaii, Haw. Rev. Stat. Ann. § 588-1 [reduce the number of interviews of child abuse victims so as to minimize re-victimization of the child]; New Hampshire, N.H. Rev. Stat. Ann. § 169 C:38(II) [law enforcement and child protection agency shall cooperate in limiting the number of interviews of a child victim]; North Dakota, N.D. Cent. Code § 12.1-35-04 [protecting the victims from repeated or lengthy interviews]; Utah, Utah Code Ann. § 77-37-4 [child interviews kept to a minimum]; West Virginia, W. Va. Code §§ 61-8B-14 and 61-8C-5 [limits on interviews of children in child abuse matters].

Oregon but also in a myriad of states across the country.

This background makes clear that the Ninth Circuit's decision implicates a Fourth Amendment question of great significance which justifies review by, and guidance from, this Court: Do interviews performed at a public school as part of a joint investigation by social services and law enforcement officials require probable cause, a court order, exigent circumstances or parental consent before the interview, or may these officials employ the more flexible "balancing" approach of *Terry v. Ohio* to determine whether an interview is warranted?

As this Court is aware, historically, "the Fourth Amendment's guarantee against unreasonable seizures of persons was analyzed in terms of arrest, probable cause for arrest, and warrants based on such probable cause." *Dunaway v. New York*, 442 U.S. 200, 208-09 (1979). "The term 'arrest' was synonymous with those seizures governed by the Fourth Amendment." *Id.* at 209. Under this "traditional" approach, the probable cause and warrant requirements applied to all Fourth Amendment seizures of persons, "without the need to 'balance' the interests and circumstances involved in particular situations." *Id.*

Terry v. Ohio abandoned this all-inclusive view of "seizures." The *Terry* Court recognized police conduct that is less intrusive than an arrest, such as the "stop and frisk" methods used by police that were at issue,

should "be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Id.* at 20. As explained in *Dunaway,* "to determine the justification necessary to make this specially limited intrusion 'reasonable' under the Fourth Amendment, the Court balanced the limited violation of individual privacy involved against the opposing interests in crime prevention and detection and in the police officer's safety." *Dunaway,* 442 U.S., at 209 (citing *Terry,* at 22-27). The result of that balancing approach, of course, was the now well-known "reasonable suspicion" standard of *Terry.*[16]

Since *Terry,* this Court has consistently recognized that "reasonableness," not the traditional requirements of a warrant and probable cause, forms the touchstone of the Fourth Amendment. *See, e.g.,*

[16] Since *Terry,* where the "balancing test" was first enunciated by the Court, it has been stated in more generalized terms to enable its application in a variety of contexts. Thus, in order to determine whether a search or seizure is reasonable under the Fourth Amendment, the Court will balance "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas,* 443 U.S. 47, 51 (1979). This balancing is part of the overall reasonableness inquiry, which "is a dual one – whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry,* 393 U.S. at 20.

New Jersey v. T.L.O., supra, 469 U.S. 325, 337-42.[17] Thus, not all seizures must be supported by a warrant or a recognized exception to the warrant requirement. This Court has repeatedly observed that legitimate reasons dictate that some encounters between a government official and a citizen involving a law enforcement purpose do not require probable cause and a warrant before they can take place.

S.G.'s interview in this case was such an encounter. Any intrusion into her interests resulting from the interview was relatively minimal. Precedent dictates that students' freedoms of movement and privacy are limited in the public school context. *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 655-56 (1995) (citing *T.L.O., supra,* at 336, 339). While schoolchildren do not shed their constitutional rights upon entering a school, "Fourth Amendment rights . . . are different in public schools than elsewhere." *Id.* Inquiries into the constitutionality of in-school searches and seizures "cannot disregard the schools' custodial and tutelary responsibility for the children." *Id.* at 656. A student's privacy interests are limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. *Id.* Thus, "[a] degree of supervision and control that could not be exercised over free adults" is permitted in the public school context. *B.C. v. Plumas*

[17] *T.L.O.* expressly adopted the *Terry* balancing approach in the context of the search of a student at a public school. 469 U.S. 325, 341-42.

Unified School Dist., 192 F.3d 1260, 1269 (9th Cir. 1999) (quoting *Vernonia*, 515 U.S. at 655-56).

At the same time, the responsible governments possess an extraordinary interest in promptly and effectively investigating allegations of sexual abuse. *See, e.g., New York v. Ferber*, 458 U.S. 747, 756-57 (1983) (the government's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling"); *Wyman v. James*, 400 U.S. 309, 318 (1971) (the needs of a child are "paramount" and "[t]here is no more worthy object of public concern.")

This Court has yet to address the application of the *Terry/T.L.O.* balancing approach in the context of child abuse investigations. As the Ninth Circuit panel in this matter recognized, while the question has been addressed by several circuits in analogous situations, they are divided on whether the *Terry/T.L.O.* "balancing" approach is appropriate in this context. *Greene*, 588 F.3d at 1026, n. 11. Certainly, there exists precious little clear guidance on the type of interview involved herein – where a suspected *victim* of parental child abuse was interviewed at a public school.[18] Since many states employ similar coordinated interviews in suspected child abuse cases, and since these interviews are substantial and highly effective

[18] As discussed in Section C, only one case at the circuit level – *Gates v. Texas Dept. of Protective and Regulatory Services*, 537 F.3d 404 (5th Cir. 2008) – addresses the issue in this specific context. The Ninth Circuit decision below is clearly at odds with *Gates*.

tools for protecting children from abuse, it is critical for law enforcement and child protective agencies to receive clear guidance concerning the legality of such interviews in relation to the Fourth Amendment. This case presents the Court with an appropriate vehicle to provide necessary guidance to those government officials charged with protecting our children.

B. The Ninth Circuit's Holding Conflicts With This Court's Holding In *Illinois v. Lidster*.

Review of this case is warranted because the Ninth Circuit's opinion conflicts with *Illinois v. Lidster*, 540 U.S. 419 (2004). In *Lidster*, the *Terry* "balancing" test was employed to examine a brief, suspicionless detention of motorists at a police checkpoint which was utilized to determine if any of the motorists had witnessed a recent hit-and-run accident in the area. *Id.* at 421-22. The *Lidster* Court distinguished the checkpoint involved in that case from the police checkpoint involved in its earlier decision in *Indianapolis v. Edmond*, 531 U.S. 32 (2000). The Court found it highly significant that the checkpoint in *Edmond* was specifically intended to determine whether the motorists stopped at the checkpoint were themselves perpetrating a crime, whereas the checkpoint involved in *Lidster* was intended only to determine whether those stopped at the checkpoint had information regarding a crime likely committed by someone else:

> The checkpoint stop here differs significantly from that in *Edmond*. The stop's primary law

> enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend not the vehicle's occupants, but other individuals.

Id. at 423 (emphasis in original).

The *Terry* "balancing" test was then applied by the *Lidster* Court to determine the reasonableness of the checkpoint at issue. The Court first observed that a motorist in a car has reduced interests in privacy and liberty when driving on a public road, observing that "[t]he Fourth Amendment does not treat a motorist's car as his castle." *Id.* at 424. It then found that the competing government interest was compelling: "The relevant public concern was grave. Police were investigating a crime that had resulted in a human death. No one denies the police's need to obtain more information at that time. And the stop's objective was to help find a the perpetrator of a specific and known crime, not of unknown crimes of a general sort." *Id.* at 427. Finally, the Court ruled the intrusion into the individual interests of the motorists involved was minimal: "Most importantly, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect," given that each stop was brief and "provided little reason for anxiety or alarm." *Id.* at 427-28. Balancing those

factors, as required by *Terry*, the Court held the suspicionless seizure of motorists at the checkpoint was constitutional. *Id.* at 428.

In its decision, the Ninth Circuit relied on this Court's holding in *Ferguson v. City of Charleston, supra,* to reject the application of the *Terry/T.L.O.* "balancing" test to S.G.'s interview. However, nothing in *Ferguson* precludes applying *Terry* "balancing" to this case. The *Ferguson* Court held that the *Terry/T.L.O.* test, as it had been applied in its "special needs" cases, is not applicable to searches where a law enforcement purpose is involved. 532 U.S. at 78. Because *T.L.O.* was one of the "special needs" cases discussed in *Ferguson,* the Ninth Circuit took this to mean the *Terry/T.L.O.* analysis is precluded whenever a government seizure involves a law enforcement purpose. *Greene,* 588 F.3d at 1026-27. Thus, based on Alford's presence at S.G.'s interview, the Ninth Circuit concluded a *Terry/T.L.O.*-based analysis in this case was not permitted. *Id.* at 1030.

The Ninth Circuit's holding in this case clearly conflicts with *Lidster.* While *Lidster* has been referred to as a "special needs" case,[19] it is clearly distinguishable from those "special needs" cases the *Ferguson* Court held to be inapplicable in situations where a law enforcement purpose is present. In this sense, *Lidster* can be viewed either as providing an

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[19] *See U.S. v. Kincade,* 379 F.3d 813, 823 (9th Cir. 2004) (referring to *Lidster* as a "special needs" case)

exception to *Ferguson's* general rule that the "special needs" doctrine does not apply to governmental action having a law enforcement purpose, or it simply can be viewed as a recognition by this Court that in some circumstances intrusive government conduct such as a seizure does not result in an invasion of the privacy and/or liberty interests of a citizen that is so severe as to require probable cause and a warrant.[20] Viewed either way, *Lidster* clearly provides that, where a person seized is a potential witness to a crime as opposed to a person suspected of a crime, the requirement for a warrant or one of the exceptions to the warrant requirement are not necessary before the seizure is performed. Rather, the *Terry/T.L.O.* "balancing" test should be used to measure the "reasonableness" of the seizure under the Fourth Amendment.

The *Terry/T.L.O.* "balancing" approach should have been applied by the Ninth Circuit in the underlying appeal. Just as the motorists in *Lidster* were potential witnesses to a crime, not suspects, S.G. was seized not because she was suspected of a crime, but

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[20] The distinction between the seizure upheld as "reasonable" in *Lidster* and the conduct *Ferguson* held to be subject to traditional warrant and probable cause requirements was, in fact, acknowledged by the Ninth Circuit in *al-Kidd v. Ashcroft*, 580 F.3d 949, 969 (9th Cir. 2009) (acknowledging the distinction made in *Lidster* between "special needs" cases involving seizures designed to determine whether a person has committed a crime and seizures designed to elicit information about the suspected crime of another).

rather because she was a potential witness to the alleged crimes of her father. To be consistent with *Lidster,* the Ninth Circuit should have analyzed S.G.'s seizure using the balancing approach of *Terry.* Accordingly, the Court should grant this petition and review the Ninth Circuit's rejection of the *Terry/T.L.O.* "balancing" approach and its application of the warrant/probable cause standard to these different but all too common circumstances.

C. The Ninth Circuit's Holding Is In Conflict With Several Other Circuits Concerning Whether The *Terry/T.L.O.* "Reasonableness" Standard Applies To An In-School Interview Of A Student At A Public School.

The Ninth Circuit recognized the federal courts are split on the applicability of the *Terry/T.L.O.* analysis to investigations of child abuse. *Greene,* 588 F.3d at 1026, n. 11. It acknowledged several circuits have adopted the *Terry/T.L.O.* analysis to measure the seizures of children in the context of similar investigations. *Id.* (citing *Doe v. Bagan, supra,* 41 F.3d 571, 575 n. 3 (10th Cir. 1994) (applying *T.L.O.'s* lower standard of "reasonableness" to the seizure of a student at school during a child sexual abuse investigation); *Wildauer v. Frederick County,* 993 F.2d 369, 372-73 (4th Cir. 1993) (applying *T.L.O.* "reasonableness" analysis to seizure of children from foster home in child neglect investigations); and *Daryl H. v. Coler,* 801 F.2d 893, 900-02 (7th Cir. 1986) (applying the *T.L.O.* standard of "reasonableness" to a seizure and strip search of a suspected child abuse victim and

holding the warrant and probable cause requirements inapplicable).[21]

While these holdings indeed differ from the Ninth Circuit's conclusion as to the application of the *Terry/T.L.O.* analysis, the panel decision creates an additional and more factually specific split with the Fifth Circuit holding in *Gates v. Texas Dept. of Protective and Regulatory Services, supra,* 537 F.3d 404 (5th Cir. 2008).

In *Gates*, State officials removed children from a public school on two separate occasions and took them to a separate location for a videotaped interview during an investigation of alleged parental abuse. *Id.* The interview took place at the Child Advocacy Center ("CAC"), which had been established as a place to bring suspected child abuse victims specifically for the purpose of questioning them concerning

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[21] The panel listed *Tenenbaum v. Williams,* 193 F.3d 581, 604 (2d Cir. 1999), as one holding rejecting the application of the *Terry/T.L.O.* "balancing" approach in favor of the traditional warrant/probable cause approach in the course of child abuse investigations. While an exigent circumstances analysis was ultimately employed by the Court in analyzing the removal of a child from school to conduct a physical examination for evidence of sexual abuse, the Court acknowledged without elaboration that an exigent circumstances analysis might not always be appropriate, stating "[W]e refrain from deciding categorically, as did the district court, that the removal of a child of whom abuse is suspected is not a "special needs" situation. There may be circumstances in which the law of warrant and probable cause established in the criminal setting does not work effectively in the child removal or child examination context."

allegations of abuse. *Id.* The goal of the CAC was "to coordinate child abuse investigations among the various branches of government, including the Texas Department of Protective and Regulatory Services, county law enforcement, and the district attorney so that children will not experience the trauma of multiple investigations from the different governmental entities." *Id.* Through the use of this facility, "a CAC worker may conduct one interview of a child that can then be used by any branch of government, rather than each entity conducting its own interview." *Id.* Thus, these children, unlike S.G., were removed from their school and driven to an unfamiliar location for a videotaped interview conducted, in part, for a law enforcement purpose.

The *Gates* plaintiffs argued the Court should employ the traditional probable cause/exigent circumstances approach to analyze these seizures. *Id.* at 432. The Fifth Circuit declined to do so, rejecting this approach in favor of the more lenient *Terry* "balancing" test. *Id.* at 431-34 ("In assessing the reasonableness of a seizure, we are to balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests that justify the intrusion.") (citing *U.S. v. Place,* 462 U.S. 696, 703 (1983) (discussing the application of the *Terry* "balancing" test)). In its analysis, the Fifth Circuit acknowledged the vast difference between a seizure of a child from home and a seizure from a public school, where a child's liberty and privacy interests are limited:

> The Gates would have us adopt an exigent circumstances standard similar to the one employed when children are seized from their homes for the purposes of taking them into state custody. Such a blanket rule, however, fails to account for the differences in the nature and quality of the intrusion. Temporarily seizing a child from a public school in order to interview him in a safe place is decidedly different than seizing a child from his home for the purpose of removing him from allegedly abusive parents.
>
> To begin with, the rights of children to freely move about, especially within a public school, are not as extensive as adults' rights. The Supreme Court has recognized that Fourth Amendment rights of children "are different in public schools than elsewhere; the 'reasonableness inquiry cannot disregard the schools' custodial and tutelary responsibilities for children.'" Thus, while the Fourth Amendment is not non-existent, students have a lesser expectation of privacy. Further, unemancipated minors lack the right to come and go at will, remaining subject to the control of their guardians or parents. Consequently, seizing a child from a public school is a lesser intrusion into the freedoms the child would otherwise enjoy, as those freedoms have already been limited.

Id. at 432 (citing *Vernonia School Dist., supra,* 515 U.S. at 654, 656-57).

The *Gates* Court next held the nature and scope of the seizure in this context was reasonable, given the circumstances:

> [T]he nature and scope of the intrusion into the child's right is relatively small. The seizures in this case were for the purpose of interviewing the children for their own protection. As described above, the CAC was created with the purpose of reducing trauma to the possible victims of child abuse by coordinating child abuse investigations among the various branches of government. Although claiming that a seizure of a child is for his benefit will not automatically justify a seizure, it is a factor that should be taken into account.

Id. (citations omitted).

Based on this analysis, the Court adopted the *Terry/T.L.O.*[22] approach to analyze the seizure and removal of a child from a public school during a child abuse investigation:

> Given the differences in the freedoms enjoyed by children inside a public school, the nature and scope of the seizures at issue, and

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[22] Although the Fifth Circuit did not expressly adopt the *T.L.O.* analysis in *Gates*, it cannot be ignored that the Court's recognition of the reduced protections of public school students within the framework of the *Terry* "balancing" analysis is extremely similar, if not identical, to the analysis used by this Court in *T.L.O.*

> the need to promptly investigate and act upon allegations of child abuse, we believe an exigent circumstances analysis sets too high a threshold for the state to overcome when investigating allegations of child abuse. However, removing a child from a public school solely on the basis of an anonymous report is not a constitutional solution either. The answer lies somewhere in between.
>
> . . . Just as "an anonymous tip, standing alone, is rarely sufficient to provide probable cause for a warrant," an anonymous tip regarding child abuse will rarely be sufficient to justify the seizure of a child. However, anonymous tips that have been independently corroborated by government officials may provide sufficient grounds to seize a child. Thus, before seizing a child on the basis of an anonymous tip, [defendant] must sufficiently corroborate the tip by initiating its own investigation. This might involve a preliminary interview of the child, his teachers, or peers, or perhaps a visual inspection of any injuries that can be seen without the removal of the child's clothing.

Id. at 433 (citation omitted).[23]

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[23] Specifically, the *Gates* standard is that "before a social worker can remove a child from a public school for the purpose of interviewing him in a central location without a court order, the social worker must have a reasonable belief that the child has been abused and probably will suffer further abuse upon his return home at the end of the school day." *Gates*, 537 F.3d at 433.

A similar seizure occurred later at a YMCA, where, during a home/private school function, and unbeknownst to the caretaker who was supervising the children, sheriff's deputies took two of the Gates' children into a separate room to interview them about allegations of abuse. *Id.* at 434. The Fifth Circuit held that because this intrusion was minor and of short duration, it "was very similar to an investigatory detention, as approved in *Terry v. Ohio* [citation omitted] in that it was supported by reasonable suspicion and was no more intrusive than necessary. There is nothing to suggest the Fort Bend deputies stepped outside their constitutional bounds." *Id.* Therefore, the *Gates* Court expressly applied the *Terry* "balancing" approach to analyze the investigatory conduct of the sheriff's deputies.

The Ninth Circuit's holding, requiring a warrant, a court order, exigent circumstances or parental consent for the S.G. interview at her public school, conflicts sharply with the Fifth Circuit's holding in *Gates*. Again, and for this reason, review by the Supreme Court is justified.

D. *New Jersey v. T.L.O.* Provides The Appropriate Framework For Applying The *Terry* "Balancing" Test To Child Interviews In Public Schools.

As mentioned above, *New Jersey v. T.L.O.* considered the constitutionality of searches of students by school officials at a public school. 469 U.S. at 328.

The *T.L.O.* Court expressly applied *Terry's* balancing approach to determine whether the student searches at issue were reasonable under the Fourth Amendment. *Id. T.L.O.* emphasized that students at a public school have lesser expectations of privacy and liberty than members of the population generally. *Id.* at 340, 348 (Powell, J., concurring). Since *T.L.O.*, this Court has maintained that students in public schools cannot expect the same level of privacy and liberty as they might expect at home or elsewhere. *See, e.g., Vernonia School Dist., supra,* 515 U.S. at 655-56.

In *Gates*, the Fifth Circuit found the distinction between a child's Fourth Amendment rights at home and such rights at a public school to be significant. *Supra,* 537 F.3d at 432-34.[24] Based on this distinction, and applying the *Terry* "balancing" test to the in-school seizures of children involved in *Gates*, the Fifth Circuit held these seizures to be reasonable, despite the fact that a law enforcement purpose was involved. *Id.*

In its opinion, the Ninth Circuit relied, in large part, on its prior decision in *Calabretta v. Floyd,* 189 F.3d 808 (9th Cir. 1999) to conclude that *Terry* "balancing" was not appropriate in this case. *Greene,* 588 F.3d at 1022 ("*Calabretta* does not resolve the Fourth Amendment issue in this case but goes a fair

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[24] "[P]hysical entry of the home is the chief evil against which the . . . Fourth Amendment is directed." *Gates,* 537 U.S. at 420 (quoting *U.S. v. U.S. District Court,* 407 U.S. 297, 313 (1972)).

way toward doing so.") However, *Calabretta* arose from a seizure of children at their *home* by a social worker and a police officer. *Id.* at 811. It did not involve a seizure at a public school. This distinction was barely touched on by the panel in this case, and it does not appear to have factored into the panel's decision, despite the fact that the Ninth Circuit had explicitly acknowledged this distinction in *Calabretta*. *Id.* at 816 ("[*T.L.O.*] has no bearing on searches of a home. . . . The [*T.L.O.*] [C]ourt emphasized that it was the 'school setting' that 'requires some easing of the restrictions to which searches by public authorities are ordinarily subject.'") (citing *T.L.O.*, 469 U.S. at 340.) Yet, unlike the Ninth Circuit's decision here, the *T.L.O.* Court held this distinction to be crucial in determining whether *Terry* "balancing" should be applied in the public school context.

Although the *T.L.O.* Court was considering "searches carried out by school authorities acting alone and on their own authority," 469 U.S. at 341 n. 1, nothing in its decision prohibits the application of *Terry's* balancing approach to seizures of students by non-school officials in a public school. *T.L.O.*'s central analysis, which recognized that students have limited privacy and liberty interests while at a public school and that competing governmental interests must be weighed against the interests of students when analyzing an in-school seizure, provides the appropriate framework for applying the *Terry* "balancing" test here. The *Terry* test, as incorporated in *T.L.O.*, should

have been applied in this case to balance S.G.'s reduced privacy and liberty interests at her school against the legitimate interests of Deputy Alford and Camreta in determining whether S.G. had been abused by her father. This, along with the previous reasons discussed in this Petition, justifies review of the Ninth Circuit's opinion by this Court.

CONCLUSION

For the for the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Plaintiff-Appellant

v.

BOB CAMRETA; DESCHUTES COUNTY; JAMES ALFORD, Deschutes County Deputy Sheriff; BEND LAPINE SCHOOL DISTRICT; TERRY FRIESEN,

Defendants-Appellees

No. 06-35333

D.C. No.
CV-05-06047-AA

OPINION

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted
March 6, 2008 – Portland, Oregon

Filed December 10, 2009

Before: Marsha S. Berzon and Carlos T. Bea, Circuit Judges, and Philip Gutierrez,* District Judge.

Opinion by Judge Berzon

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* The Honorable Philip Gutierrez, United States District Court for the Central District of California, sitting by designation.

COUNSEL

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Hardy Myers, Attorney General; Mary H. Williams, Solicitor General; David B. Thompson, Senior Assistant Attorney General; for Bob Camreta, Defendant-Appellee. Janet M. Schroer, Hoffman, Hart & Wagner, LLP, for Terry Friesen and Bend LaPine School District, defendants-appellees. Christopher Bell and Mark P. Amberg, Deschutes County Legal Counsel, for Deputy Sheriff James Alford and Deschutes County, defendants-appellees.

OPINION

BERZON, Circuit Judge:

We are asked to decide whether the actions of a child protective services caseworker and deputy sheriff, understandably concerned for the well-being of two young girls, exceeded the bounds of the constitution. Specifically, the girls' mother, Sarah Greene, alleges, on behalf of S.G., one of her children, that the caseworker, Bob Camreta, and deputy sheriff, James Alford, violated the Fourth Amendment when they seized and interrogated S.G. in a private office at her school for two hours without a warrant, probable cause, or parental consent. Sarah also argues that Camreta's subsequent actions, both in securing a court order removing the girls from her custody and in subjecting the girls to intrusive sexual

abuse examinations outside her presence, violated the Greenes' familial rights under the Due Process Clause of the Fourteenth Amendment.

As this brief description makes clear, resolving the constitutional claims at issue in this case involves a delicate balancing of competing interests. On one hand, society has a compelling interest in protecting its most vulnerable members from abuse within their home. The number of child abuse allegations is staggering: In 2007, for example, state and local agencies investigated 3.2 million reports of child abuse or neglect. *See* U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES. CHILD MALTREATMENT 2007 (2009), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm07/chapter2.htm.

On the other hand, parents have an exceedingly strong interest in directing the upbringing of their children, as well as in protecting both themselves and their children from the embarrassment and social stigmatization attached to child abuse investigations. Of the millions of investigations conducted by state and local agencies in 2007, only about a quarter concluded that the children were indeed victims of abuse. *See id.* This discrepancy creates the risk that "in the name of saving children from the harm that their parents and guardians are thought to pose, states ultimately cause more harm to many more children than they ever help." Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic*

Costs of a Child Welfare Exception to the Fourth Amendment, 47 WM. & MARY L. REV. 413, 417 (2005).

With these competing considerations in mind, we turn first to Sarah's constitutional claims. As we explain below, we hold that the investigation conducted by Camreta and Alford and the removal and examination instigated by Camreta all violated Sarah and the girls' constitutional rights. As to the investigation, however, we conclude that Camreta and Alford cannot be liable in damages because they have qualified immunity.

I. FACTS & PROCEDURAL HISTORY

A. FACTUAL BACKGROUND

Nimrod Greene ("Nimrod") was arrested on February 12, 2003, for suspected sexual abuse of F.S., a seven-year old boy. Nimrod's arrest was based on statements made by F.S. to his parents and similar statements later made to investigators, all alleging that Nimrod had touched F.S.'s penis over his jeans when Nimrod was drunk in F.S.'s parents' home. F.S. reported that Nimrod had done this to him once before. In addition, F.S.'s mother told officers that Sarah, Nimrod's wife, "had talked to her about how she doesn't like the way Nimrod makes [their daughters, S.G. and K.G.,] sleep in his bed when he is intoxicated and she doesn't like the way he acts when they are sitting on his lap." Along the same lines, F.S.'s father told officers that:

> Nimrod himself has made some type of prior comment about how his wife Sarah was accusing him of molesting his daughters and Sarah reportedly doesn't like the girls laying in bed with Nimrod when he has been drinking. [F.S.'s father] said neither he nor his wife [ ] have any direct knowledge of abuse at the Greene home, but this type of comment and/or accusation has come in several ways from Sarah and Nimrod.

The Oregon Department of Human Services ("DHS") heard of these allegations about a week after Nimrod's arrest. The next day, Bob Camreta, a caseworker with DHS, learned that Nimrod had been released and was having unsupervised contact with his daughters. Camreta was assigned to assess the girls' safety. Based on his training and experience as a DHS caseworker, Camreta was "aware that child sex offenders often act on impulse and often direct those impulses against their own children, among others. For this reason, [he was] concerned about the safety and well-being of Nimrod Greene's own small children."

Three days after hearing of Nimrod's release, Camreta visited S.G.'s elementary school to interview her. Camreta thought the school would be a good place for the interview because it is a place where children feel safe and would allow him "to conduct the interview away from the potential influence of suspects, including parents." According to Camreta, "[i]nterviews of this nature, on school premises, are a regular part of [child protective services] practice and

are consistent with DHS rules and training." Sarah was not informed of, nor did she consent to, the interview of her daughter. Camreta also did not obtain a warrant or other court order before the interview.

Throughout the interview Camreta was accompanied by Deputy Sheriff Alford. Upon arriving at the school, Camreta told school officials that he and Alford were there to interview S.G. and requested use of a private office. Terry Friesen, a counselor at the elementary school, visited S.G. in her classroom and told the child that someone was there to talk with her. Friesen took S.G. to the room where Camreta and Alford were waiting and left.

Camreta interviewed S.G. for two hours in Alford's presence.[1] The interview was not recorded. Alford, who had a visible firearm, did not ask any questions during the interview. According to Camreta, S.G. told him:

- " 'When he drinks he tries to do it,' meaning, 'he tries to touch me somewhere in my private parts. Then I go to my room and lock the door.' "

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[1] The parties dispute the length of the interview. Both Camreta and Alford assert that the interview lasted about an hour, while S.G. maintains that it lasted two hours. Because this is a motion for summary judgment, we view the facts in the light most favorable to the non-moving party and so assume that the interview lasted two hours.

- The last incident occurred "'just last week' on the outside of her clothing and she had tried to tell him to stop."
- "The touching of private parts started when she was three."
- "The touching involved the chest and buttock areas, outside of clothing. Her father sometimes 'mumbled' during the touching."
- "Her mother knew about the touching . . . " and it was "'one of our secrets' with her little sister, K.G.'"

Camreta maintains that he "certainly did not coerce [S.G.] or try to induce her into making any accusations."

In contrast, S.G. recounted the interview as follows:

> [Camreta] ask[ed] me if sometimes my dad touched me all over my body. I thought back to the times when my dad hugged me, kissed me, gave me piggy-back rides, rides on his shoulders and horsey rides. I remembered all of my dad's touches with fondness. He was a very loving father, and I loved hugging and kissing him. These were the touches that I was referring to when I said my dad touched me. So I told the man, yes, my dad touches me all over. And then the man started asking me if sometimes those were bad touches, and I said, no they weren't, but he kept asking me over and over again, and I would say, no,

> I don't think my dad touched me in a bad way. He would say, "No, that's not it," and then ask me the same question again. For over an hour, Bob Camreta kept asking me the same questions, just in different ways, trying to get me to change my answers. Finally, I just started saying yes to whatever he said. And then after a while, he said I could go. I believe I was there for two hours.

According to Sarah, later that night S.G. told her that when Camreta asked her what bad things her father had done, she initially told him "nothing," but that Camreta kept asking questions and confused her. S.G. stated that she was "scared" when Friesen left her with Camreta and Alford, although she did not ask to call home, did not ask to have Friesen or her parents with her, and did not cry. With respect to Alford's presence, S.G. stated that she is generally comfortable around police officers, that Alford was nice to her and did not do anything to scare her, and that she trusted him.

Based on the interview and other information he had gathered, Camreta believed that Nimrod had sexually abused S.G. As a result, Camreta and Alford visited the Greenes' home and spoke with Sarah and Nimrod. Both parents denied any sexual abuse but agreed to a safety plan whereby, pending an investigation, Nimrod would not have unsupervised contact with his two daughters, S.G. and K.G. The safety plan also provided that S.G. would undergo a sexual abuse examination at the KIDS Intervention & Diagnostic

Service Center ("the KIDS Center"), which specializes in child sexual abuse. Camreta advised the parents not to speak with their children about the allegations of abuse.

On March 6, 2003, Nimrod was indicted on six counts of felony sexual assault of F.S. and S.G. He was shortly released but ordered not to have any contact with his daughters. That same day counsel for the Greenes informed Camreta that he had been retained to represent the family, that all family members had been advised of their Fifth Amendment right to remain silent and had chosen to invoke that right, and that no one from DHS had permission to meet with a member of the family without counsel present.

The next day, Camreta went to the Greene home to inform Sarah of the court's no-contact order and assess whether Sarah would comply with it. Sarah indicated that she had hired an attorney to defend her husband, that the allegations against him were lies, and that she had talked to S.G. about the allegations of abuse.

Sarah's and Camreta's accounts of the conversation between them on March 7 diverge in two respects. First, with regard to the no-contact order, Sarah stated that she told Camreta:

> [W]hile it would be significantly detrimental to [her] family finances, there was a place [her] husband could stay so that he would have no contact with [her] children. [She] specifically informed Mr. Camreta that [she]

> intended to abide by [the] Safety Plan and that [she] would take the children to the KIDS Center.

In contrast, Camreta maintains that Sarah told him "that she had no extra resources for Nimrod to obtain alternative housing, which [Camreta] understood to mean [Nimrod] would be returning home."

Second, Sarah stated she told Camreta that she "did want [her] children interviewed at the KIDS Center" and "would not interfere with them being interviewed," although she "wished to attend [their] medical examination[s], to be there to help them through the emotionally traumatic event." Camreta maintains that "[Sarah] refused to sign an informational release form to facilitate the pending sex abuse examination of her daughter at the KIDS Center."

Following the March 7 conversation, Camreta was concerned that DHS would not be able to ensure the safety of the children because Sarah denied Nimrod's abuse and was unwilling to place her children's interests over those of her husband. Convinced that he had a duty to take protective action, Camreta decided to seek an order removing both children from Sarah's home.

On March 11, 2003, Camreta petitioned the Deschutes County Juvenile Court for an order removing S.G. and K.G. from the Greene home and placing them in foster care. In an affidavit filed with the Juvenile Court, Camreta represented that "[Sarah] indicated the family had no alternate resources for

either the children or Nimrod to ensure there would be no contact," and that she "refused to sign an information release form for a Kid's Center evaluation for the girls." Citing the letter from the Greenes' counsel, Camreta stated that "[w]ithout access to the family members[ ] and the home DHS is unable to monitor and ensure the safety of the children and unable to ensure that the children receive forensic interviews and exams to determine the health and welfare of S.G. and K.G., and to conclude the investigation."

After reviewing Camreta's petition and affidavit, the Juvenile Court issued a protective custody order authorizing the removal of S.G. and K.G. from the Greene home. DHS took protective custody of S.G. and K.G. the same day.

The next day, the Juvenile Court held an emergency shelter hearing, which both Sarah and Nimrod attended with counsel.[2] At the conclusion of the hearing, the Juvenile Court placed the children in DHS's temporary custody, scheduled KIDS Center

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[2] The district court characterized the shelter hearing as "an opportunity [for Sarah], with counsel, . . . to challenge the evidence presented in support of the court order." The record, however, contains virtually no information about the shelter hearing, other than the facts that both parents attended with counsel, that counsel was appointed for the children, and that the hearing took one hour and fifteen minutes. The record does not indicate whether the Greenes presented evidence at the emergency shelter hearing to rebut Camreta's assertion that Nimrod was unable to comply with the no-contact order.

assessments for both girls, ordered that the children be made available to participate in those assessments, prohibited Sarah from discussing the case with the children, ordered Nimrod not to have any contact with the children, and directed DHS to return the children to Sarah's care "as soon as [a] safety plan is in place and DHS concerns have been addressed."

DHS had custody of the children from March 11 through March 31, 2003. The two girls lived in a local foster home for those weeks. Sarah's contact with her daughters was limited to pre-arranged, supervised visits.

K.G. was interviewed and examined at the KIDS Center on March 20, 2003, and S.G. was interviewed and examined on March 31, 2003. On the day of K.G.'s examination, Sarah went to the KIDS Center "fully intend[ing] to cooperate with the KIDS Center and lend whatever assistance and support [she] could to [her] daughter." According to her affidavit, however, she was prevented from doing so when KIDS Center staff, acting "under orders of Bob Camreta," forced her "to leave the premises." Sarah was also excluded from the premises during S.G.'s examination.

At her KIDS Center interview, S.G. said that her earlier statements to Camreta concerning Nimrod were not true and that he had not abused her. During the examination, S.G. was told to undress, and the examiners "looked all over [her] body," "took pictures of [her] private parts," and used a magnifying glass scope to visually examine her. In her deposition, S.G.

stated that a doctor asked her to let her know if she felt uncomfortable and told her that the examination would stop if she felt uncomfortable, but that she never told the doctor she felt uncomfortable or asked to stop the interview. She also testified that she felt fine after the examination was over and did not feel sick or upset. In her affidavit, however, S.G. stated, "I wish my mom could have been there. I felt very scared and alone. . . . [T]hey looked all over my body, and it was very uncomfortable."

Ultimately, the KIDS Center examiners could not determine whether S.G. and K.G. had been sexually abused. Even so, they "remained concerned for [S.G.] especially as there appears to be a high likelihood that S.G. may have recanted her statements about her father touching her privates in an attempt to expedite her return home." Despite these concerns, the Juvenile Court, at DHS's request, ordered the children returned to their mother's custody on March 31, 2003.

Nimrod eventually stood trial on charges of sexual abuse but the jury did not reach a verdict. Faced with a retrial, Nimrod accepted an *Alford* plea with respect to the alleged abuse of F.S.[3] The charges concerning S.G. were dismissed.

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[3] A defendant who enters an *Alford* plea maintains his innocence but admits that sufficient evidence exists from which a judge or jury could find him guilty. *See North Carolina v. Alford*, 400 U.S. 25 (1970).

B. Procedural History

Sarah filed this action on behalf of herself, S.G., and K.G. under 42 U.S.C. § 1983, alleging that: (1) Camreta and Alford's in-school seizure of S.G. without a warrant, parental consent, probable cause, or exigent circumstances violated the Fourth Amendment; (2) Camreta violated the Greenes' rights under the Fourteenth Amendment by intentionally presenting false information to the Juvenile Court to obtain an order to remove the children from Sarah's custody and by removing the children from Sarah's care; and (3) Camreta and the KIDS Center violated the Greenes' Fourteenth Amendment rights by unreasonably interfering with Sarah's right to be with her children and with the children's right to have their mother present during an intrusive medical examination.[4]

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[4] There were other defendants, claims, and requests for relief in the Greenes' complaint, not pertinent to this appeal.

In particular, the complaint alleged custom and policy claims against Bend LaPine School District and Deschutes County with regard to the seizure of S.G. The district court rejected those claims, and the Greenes' opening brief does not challenge that holding. Any challenge to the dismissal of the claims against the School District and the County has therefore been waived, and the dismissal stands. *See Ind. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003).

The Greenes also brought a claim against Friesen, the school guidance counselor, for her role in removing S.G. from class to conduct the interview. Friesen was sued only in her official capacity. Claims against Friesen in her official capacity are treated as if they had been brought directly against the school

(Continued on following page)

The district court granted summary judgment to all defendants. As to the in-school interrogation, the court held that S.G. had been seized when she was taken from her classroom and interviewed by Camreta and Alford but that the seizure was "objectively reasonable under the facts and circumstances of this case." Moreover, even if the Greenes' constitutional rights had been violated, the district court held, Camreta and Alford were entitled to qualified immunity because "no reasonable school official, caseworker, or police officer would have believed [their] actions violated the Fourth Amendment."

With respect to the removal of S.G. and K.G. from Sarah's custody and Sarah's exclusion from their medical examinations, the court held that there were no due process violations because the girls were removed from Sarah's custody pursuant to a court order and Sarah was given an opportunity to be heard at the custody hearing. The court also concluded that (1) Camreta was, in any event, entitled to absolute quasijudicial immunity regarding the removal of the girls; and (2) excluding Sarah from the examinations did not violate the Fourteenth Amendment because Sarah did not have custody at that time and the examinations conformed with Oregon statutory and administrative law.

The Greenes timely appealed.

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district, *see Butler v. Elle*, 281 F.3d 1014, 1026 n.9 (9th Cir. 2002), so the dismissal of the suit against Friesen also stands.

II. Analysis

As this case is an appeal from the grant of summary judgment to defendants, we will draw all reasonable inferences in the Greenes' favor. Defendants, as the moving parties, bear the burden of production and persuasion. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). We review the grant of summary judgment *de novo*. *See Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007).

A. School Interview

Before proceeding to the merits of the school interview issue, a note on our reasons for addressing this central constitutional claim on the merits is in order. Ultimately, the question in this case is whether the individual defendants may be held liable in damages to the Greenes. The defendants maintain that even if they violated the Greenes' constitutional rights, they are entitled to qualified immunity and so not liable in damages.

Before the Supreme Court's recent decision in *Pearson v. Callahan*, 129 S. Ct. 808 (2009), courts addressing an official's claim of qualified immunity were required to follow the two-step sequential inquiry established in *Saucier v. Katz*, 533 U.S. 194 (2001), asking first whether the plaintiff alleged violation of a constitutional right and, second, whether that right was clearly established at the time of the conduct at issue. *Pearson* relieved courts of their obligation always to follow this sequence, permitting

"[t]he judges of the district courts and the courts of appeal . . . to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 129 S. Ct. at 818.

Although rigid adherence to the *Saucier* protocol is no longer required, *Pearson* was also careful to note that the *Saucier*'s two-step procedure is "often beneficial," as it "promotes the development of constitutional precedent." *Id.* Such is the case here, where the constitutional standards governing the in-school seizure of a student who may have been abused by her parents are of great importance. As will appear, although other circuits have provided guidance to parents, school officials, social workers, and law enforcement personnel on the issue, we have not. In a similar circumstance arising after *Pearson*, we addressed the constitutional issue on the merits first. *See Stoot v. City of Everett*, 582 F.3d 910, 918 n.8 (9th Cir. 2009) (conducting the constitutional inquiry "where we have not previously addressed whether a police officer may rely solely on the statements of a very young victim of alleged sexual abuse to establish probable cause to seize a potential suspect.") (emphasis altered). *See also Kelsey v. County of Schoharie*, 567 F.3d 54, 61 (2d Cir. 2009) ("The development of constitutional precedent is especially important here, where . . . this Court has not spoken on . . . the constitutionality of clothing exchange procedures in jails."); *Okin v. Vill. of Cornwall-On-Hudson Police Dep't*, 577

F.3d 415, 430 n.9 (2d Cir. 2009) (finding it "necessary to articulate the nature of the claimed violation" before determining whether the right in question was clearly established).

Moreover, the school interview issue does not present a "kaleidoscopic set of facts . . . creat[ing] . . . a classic genuine issue of material fact on the central issue" on which the alleged constitutional violation turns, rendering a constitutional determination too case-specific to aid in clarifying the law for the future. *Mueller v. Auker,* 576 F.3d 979, 994 (9th Cir. 2009). To the contrary, we consider the relatively straightforward question whether an in-school seizure and interrogation of a suspected child abuse victim is always permissible under the Fourth Amendment without probable cause and a warrant or the equivalent of a warrant,[5] as defendants maintain. We therefore address both prongs of the qualified immunity inquiry in this case, to provide guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment.

With that background, we proceed to consider whether, as the Greenes argue, the warrantless, in-school interview of S.G. violated S.G.'s Fourth

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[5] As discussed *infra,* Part II.A.2, we hold that in the child abuse investigation context, a court order permitting the seizure of a child is the functional equivalent of a warrant.

Amendment rights.[6] The Fourth Amendment guarantees individuals the right "to be secure in their persons . . . against unreasonable searches and seizures . . . " by government officials. U.S. CONST. amend. IV. Camreta and Alford do not contest the district court's holding that the two-hour interview of S.G. at her school was a seizure. We agree with the district court, and with the ruling of the Seventh Circuit in a very similar case, that it was. *See Doe v. Heck*, 327 F.3d 492, 509 (7th Cir. 2003) (holding that student removed from class to be questioned by a caseworker and a uniformed police officer regarding alleged abuse had been seized for Fourth Amendment purposes); *id.* at 510 n.15 (collecting similar cases). The question before us is whether that seizure was "unreasonable."

We have yet to address the principles governing the in-school seizure of a suspected child abuse victim. We have, however, previously held that the warrantless, non-emergency search and seizure of an alleged victim of child sexual abuse at her home violates the Fourth Amendment. *See Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999). *Calabretta* does not resolve the Fourth Amendment issue in this case but goes a fair way towards doing so.

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[6] The Greenes have not argued that the in-school seizure of S.G. violated Sarah's familial rights under the Fourteenth Amendment, although they have made such a claim with respect to the subsequent removal order and physical examinations. *See Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982).

In *Calabretta*, a social worker received a tip from a neighbor who claimed to have been awakened late at night by a child screaming "No Daddy, no." *Id.* at 810. Suspecting abuse, the social worker, accompanied by a police officer, visited the home, entered without consent, and interviewed and examined the children. *Id.* at 810-12. The family later brought suit, alleging violation of their Fourth Amendment rights.

The defendants in *Calabretta* maintained, primarily, that the search and seizure at the family home was reasonable because "any check on the welfare of children" triggered the "exigent circumstance[s]" exception to the Fourth Amendment's warrant requirement. *Id.* at 811. They also came at the problem another way, arguing that traditional Fourth Amendment protections do not apply to child abuse investigations at all, as such investigations constitute administrative searches requiring neither probable cause nor a warrant. *Id.* at 812. We rejected both arguments, holding both that traditional Fourth Amendment protections apply to child abuse investigations and that the family's right to be free of warrantless searches and seizures in their home, even within the context of a child abuse investigation, was clearly established at the time of the incident. *See id.* at 817. We have reaffirmed our holding in *Calabretta* twice, noting that although the crime of child sexual abuse "may be heinous . . . [this] does not provide cause for the state to ignore the rights of the accused or any other parties." *Wallis v. Spencer*, 202 F.3d 1126,

1130 (9th Cir. 2000); *see also Rogers v. County of San Joaquin*, 487 F.3d 1288, 1291 (9th Cir. 2007).

Defendants insist that *Calabretta* and *Wallis* have nothing to do with this case because S.G. was seized at school rather than at home. Citing the Supreme Court's decision in *New Jersey v. T.L.O.*, defendants argue that searches and seizures[7] in public schools are subject to a special standard of reasonableness, whereby a search or seizure is "reasonable" if it was "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." 469 U.S. 325, 341 (1985), quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1967 [sic]). Defendants urge us to conclude, in other words, that while seizing S.G. and interviewing her at home for two hours would have been unreasonable absent probable cause and a warrant or exigent circumstances, it was reasonable to do a similarly lengthy interrogation in the same way at S.G.'s school. We

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[7] Although *T.L.O.*, like many of the so-called "special needs" cases listed *infra* note 9, involved a search rather than a seizure, courts have applied the same standard to seizures of students at public schools as to searches. *See Jones v. Hunt*, 410 F.3d 1221, 1228 (10th Cir. 2005) (citing *Edwards v. Rees*, 883 F.2d 882, 844 [sic] (10th Cir. 1989)); *Wofford v. Evans*, 390 F.3d 318, 326 (4th Cir. 2004); *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir. 1995). Indeed, the standard enunciated in *T.L.O.* was based on the "reasonableness" standard established in *Terry v. Ohio*, 392 U.S. 1, 20 (1968), which involved a brief seizure for investigative purposes. We therefore draw on Fourth Amendment case law governing both searches and seizures throughout this opinion.

decline to adopt this distinction, for reasons we now explain.

1. *T.L.O.* and the Fourth Amendment in Public Schools

We begin by noting that, despite defendants' heavy reliance upon it, the Supreme Court's decision in *T.L.O.* is at best tangentially related to this case. *T.L.O.* addressed the claims of a high school student whose purse was searched by an assistant vice principal, without a warrant or probable cause, after a teacher discovered two girls smoking in the school lavatory. 469 U.S. at 328. The Court held the search reasonable even in the absence of a warrant or probable cause, explaining that the warrant requirement was "unsuited to the school environment" because it "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.* at 340. The Court similarly noted that the school setting required "some modification of the level of suspicion" needed to justify a search of students, in light of "the substantial need of teachers and administrators for freedom to maintain order in the schools." *Id.* at 340-41. The Court therefore applied a special standard – "reasonableness under all the circumstances" – which "involves a twofold inquiry: first, . . . whether the action was justified at its inception; second, . . . whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in

the first place." *Id.* at 341 (internal citation and quotation omitted).

Defendants maintain that we must apply this standard across-the-board to all searches and seizures in public schools, but the language of *T.L.O.* itself indicates that it was not meant to be read so broadly. The Court expressly noted, for example, that it was addressing only searches "by a teacher or other school official," explaining that "[b]y focusing attention on the question of reasonableness, the standard will spare teachers and administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense." *Id.* at 341, 343. The Court further clarified that it was considering "only searches carried out by school authorities acting alone and on their own authority," expressing "no opinion" on "the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies." *Id.* at 341 n.7.

The Court recently affirmed the narrowness of *T.L.O.*, characterizing it as "h[o]ld[ing] that for searches by school officials a careful balancing of governmental and private interests" requires a showing less than probable cause, and therefore applying "a standard of reasonable suspicion to determine the legality of a school administrator's search of a student." *Safford Unified Sch. Dist. v. Redding*, 129 S.Ct.

2633, 2639 (2009) (internal citation and quotation omitted).[8] *See also Ferguson v. City of Charleston*, 532 U.S. 67, 79 n.15 (2001) (noting that "[i]n *T.L.O.*, [the Court] made a point of distinguishing searches 'carried out by school authorities acting alone and on their own authority' from those conducted 'in conjunction with, or at the behest of law enforcement agencies.'").

S.G. was, of course, seized and interrogated by a social services caseworker and a deputy sheriff. Neither of these individuals qualifies as a "school official." Thus, by its own terms, *T.L.O.* does not control our resolution of S.G.'s Fourth Amendment claim. The Second Circuit has reached the same conclusion we do, holding *T.L.O.* inapplicable to the seizure of a student by a social services agency caseworker. *See Tenenbaum v. Williams*, 193 F.3d 581, 607 (2d Cir. 1999). As the Second Circuit explained, "[p]ublic schools have a relationship with their students that is markedly different from the relationship between most governmental agencies, including [Child Protective Services], and the children with whom they deal. Constitutional claims based on searches or seizures by public school officials relating to public school students therefore call for an analysis . . . that is different from that [for searches or seizures by caseworkers]." *Id.*

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[8] *Redding* held that a strip search of a girl suspected of possessing prescription ibuprofen was unreasonable under the *T.L.O.* standard.

Moreover, the Court's decision in *T.L.O.* was premised on a "special need" of government not present in this case: "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds." 469 U.S. at 339. The Court noted that disciplinary problems and student drug use had been rising in recent years, and that "the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." *Id.* It was in light of these considerations that the Court concluded that the school's need swiftly to discipline T.L.O., suspected of smoking in the lavatory in violation of school rules, would be frustrated if school officials were required first to obtain a warrant based on probable cause. *Id.* at 340-41.

In this case, by contrast, S.G. is not suspected of having violated any school rule, nor is there any evidence that her immediate seizure was necessary to "maintain[ ] discipline in the classroom and on school grounds." *Id.* at 339. The "special need" animating the Court's decision in *T.L.O.* is therefore entirely absent.[9] *See Jones v. Hunt*, 410 F.3d 1221, 1228 (10th

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[9] For the same reason, several of the other school seizure cases relied upon by defendants are inapposite, as they also address situations in which the student was suspected of committing an infraction on school grounds or during a school activity. *See, e.g., Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295 (11th Cir. 2006) (student verbally threatened teacher); *Wofford v.*

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Cir. 2005) (holding the *T.L.O.* standard inapplicable to the seizure of a student that did "not involve efforts by school administrators to preserve order on school property").

These distinctions are crucial if we are properly to assess the Fourth Amendment standard applicable to the seizure of an alleged victim of child sexual abuse at her school. "Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place." *T.L.O.*, 469 U.S. at 337. For each "specific class of searches," we determine the appropriate standard of reasonableness by " 'balancing the need to search against the invasion which the search entails.' " *Id.* (quoting *Camara v. Mun. Court*, 387 U.S. 523, 536-37 (1967)). If the seizure of a student at school to investigate sexual abuse by a parent could be said to belong to the same "specific class of searches" as the search of a student's purse to investigate a disciplinary infraction, we would be justified in applying the reasonableness standard outlined in *T.L.O.* to the facts of this case. But *T.L.O.* itself

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Evans, 390 F.3d 318 (4th Cir. 2004) (student allegedly brought gun to school); *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075 (5th Cir. 1995) (student detained and removed from school field trip due to misbehavior); *Edwards v. Rees*, 883 F.2d 882 (10th Cir. 1989) (student suspected of making a bomb threat); *Cason v. Cook*, 810 F.2d 188 (8th Cir. 1987) (student suspected of breaking into another student's locker); *Tarter v. Raybuck*, 742 F.2d 977 (6th Cir. 1984) (student suspected of dealing drugs at school).

indicates that the two types of searches differ in critical ways. We therefore cannot rely on the balancing of interests in *T.L.O.* to assess the reasonableness of defendants' decision to seize S.G.

2. The "Special Needs" Doctrine & Child Sexual Abuse Investigations

Defendants also argue that, even if the Supreme Court's decision in *T.L.O.* does not strictly control this case, *T.L.O.* stands more generally for the proposition that probable cause and a warrant are not "irreducible requirement[s] of a valid search" or seizure under the Fourth Amendment. *See T.L.O.*, 469 U.S. at 340. That much is quite true. *T.L.O.* belongs to a line of cases in which the Supreme Court has lowered traditional Fourth Amendment protections "when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."[10] *Griffin v. Wisconsin*,

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[10] Although the term "special needs" was first used by Justice Blackmun in his concurring opinion in *T.L.O.*, *see* 469 U.S. at 351 (Blackmun, J., concurring), the doctrine is rooted in the Supreme Court's decision in *Camara v. Mun. Court*, 387 U.S. 523 (1967), which addressed the constitutionality of San Francisco's warrantless building inspection program. Since *Camara*, the Court has applied the doctrine in a number of contexts in which such "special needs" exist. *See, e.g., Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (drug testing of high school students participating in extracurricular activities); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995) (random drug testing of high-school athletes); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (drug and alcohol testing of railroad employees involved

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483 U.S. 868, 873 (1987) (internal quotation omitted). Although defendants acknowledge that neither the Supreme Court nor this court has applied the "special needs" doctrine to searches or seizures of children during a child abuse investigation, they argue that the government's "special need" to protect children from sexual abuse justifies a departure from both the warrant and probable cause requirements in a case such as this one.[11] As noted above, we addressed a

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in accidents); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (drug testing of employees applying for certain Customs Service positions); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (search of probationers); *New York v. Burger*, 482 U.S. 691 (1987) (administrative inspections in closely-regulated industries); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (workplace searches of public employees); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (traffic stops at border checkpoints). *But see Ferguson*, 532 U.S. at 84-85 (refusing to extend special needs doctrine to drug testing of pregnant women for law enforcement purposes); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (refusing to extend doctrine to police roadblocks aimed at detecting narcotics trafficking); *Chandler v. Miller*, 520 U.S. 305 (1997) (refusing to extend doctrine to drug testing of candidates for political office).

[11] The federal district and circuit courts are split on the applicability of the "special needs" doctrine to investigations of child abuse. *Compare Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 406-07 (5th Cir. 2002) (holding the "special needs" doctrine inapplicable given the extensive involvement of law enforcement in investigations of child abuse under Texas law); *Tenenbaum*, 193 F.3d at 606 (applying traditional Fourth Amendment analysis to searches and seizures made in the course of child abuse investigations); *Franz v. Lytle*, 997 F.2d 784, 791 (10th Cir. 1993) (holding "special needs" doctrine inapplicable to investigation of child abuse conducted by law enforcement); *Good v. Dauphin County Soc. Servs.*, 891 F.2d

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similar argument in *Calabretta*, holding that traditional Fourth Amendment protections apply to the seizure of a child from her home. We reach the same conclusion in this case, as we now explain.

The threshold inquiry in a "special needs" case is whether the government has identified some need, "beyond the normal need for law enforcement," to justify a departure from traditional Fourth Amendment standards. *Von Raab*, 489 U.S. at 665-66; *see also Ferguson*, 532 U.S. at 74 n.7; *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1056 (9th Cir. 2002). So, although the Supreme Court has "tolerated suspension of the Fourth Amendment's warrant or probable-cause requirement[s] [when] there was no law enforcement purpose behind the searches . . . ,

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1087, 1093-94 (3d Cir. 1989) (applying traditional Fourth Amendment analysis); *with Doe v. Hagan*, 41 F.3d 571, 575 n.3 (10th Cir. 1994) (applying *T.L.O.*'s lesser standard of reasonableness to the seizure of a student during a child sexual abuse investigation); *Wildauer v. Frederick County*, 993 F.2d 369, 372-73 (4th Cir. 1993) (same); *Darryl H. v. Coler*, 801 F.2d 893, 900-02 (7th Cir. 1986) (applying *T.L.O.*'s lesser standard of "reasonableness" and holding the warrant and probable cause requirements inapplicable). In the Seventh Circuit, the appropriate standard of review under the Fourth Amendment turns on whether the student attends private or public school. *Compare Michael C. v. Gresbach*, 526 F.3d 1008, 1015 (7th Cir. 2008) (holding that caseworkers must comply with the warrant and probable cause requirements when searching and seizing students on private school grounds); *Doe v. Heck*, 327 F.3d 492, 512 (7th Cir. 2003) (same); *with Darryl H.*, 801 F.2d at 900-02 (applying lesser standard of reasonableness to the same conduct on public school grounds).

and . . . little, if any, entanglement with law enforcement" in conducting them, *Ferguson,* 532 U.S. at 79 n.15, the Court hasn't relaxed traditional Fourth Amendment protections when the main purpose of an ostensibly administrative search was to gather evidence for use in subsequent criminal proceedings, or when law enforcement personnel were substantially involved in the design and implementation of the administrative program. Indeed, "[n]one of [the Court's] special needs cases have . . . upheld the collection of evidence for criminal law enforcement purposes." *Id.* at 83 n.20; *see also Edmond,* 531 U.S. at 38. Rather, "[t]he traditional . . . requirements are waived . . . on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes." *Ferguson,* 532 U.S. at 88 (Kennedy, J., concurring).

In this case, the presence of law enforcement objectives is evident. At the time of the seizure, police were actively investigating allegations of child sexual abuse against S.G.'s father and a police officer was present at S.G.'s interview. As courts faced with similar "dual-purpose" searches have noted, "disentangling [the goal of protecting a child's welfare] from general law enforcement purposes" becomes particularly "difficult" in these circumstances, as we cannot allow "[o]ther societal objectives [to] justify a program that would systematically collect information for the police." *Roe,* 299 F.3d at 406-07; *see also Ferguson,* 532 U.S. at 83 n.20; *Edmond,* 531 U.S. at 38, 41-42.

Here, we are convinced that law enforcement personnel and purposes were too deeply involved in the seizure of S.G. to justify applying the "special needs" doctrine, for two primary reasons.[12]

First, police were conducting an ongoing investigation of S.G.'s father, and Camreta requested that Deputy Sheriff Alford, a uniformed police officer carrying a visible firearm, accompany him to the interview. A state regulation required Child Protective Service workers to "[i]nterview the child out of the presence of other persons, unless the CPS worker believes the presence of a school employee or other person would facilitate the interview." OR. ADMIN. R. 413-015-0610(4) (2003).[13] There are two apparent ways in which Alford's presence might have "facilitated" the interview. One purpose may have been to gather evidence firsthand, which would clearly run afoul of the Supreme Court's admonition that "[n]one of [its] special needs cases have . . . upheld the collection of evidence for criminal law enforcement purposes." *Ferguson*, 532 U.S. at 83 n.20; *see also Franz*, 997 F.2d at 791. Or perhaps Camreta and Alford believed that "the threat of law enforcement

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[12] The facts of this case do not require us to decide whether the "special needs" doctrine would apply to an in-school interrogation of a child where there is no direct law enforcement purpose and no involvement of law enforcement personnel.

[13] The regulations cited are those in effect at the time of the events in this case. There have been some changes since. *See* OR. ADMIN. R. 413-015-0415(5) (2009).

intervention" would provide the "necessary leverage" to "facilitate" Camreta's interview with S.G., reasoning that a nine-year-old girl would surely feel compelled to talk truthfully in the presence of a uniformed, armed police officer. *Cf. Ferguson,* 532 U.S. at 72. Either way, the decision to have Alford accompany Camreta to the interview constituted sufficient entanglement with law enforcement to trigger the traditional Fourth Amendment prerequisites to seizure of a person.

Second, we are mindful of the general rule that the constitutionality of a search or seizure cannot turn on the subjective intent of government officials. *See Whren v. United States,* 517 U.S. 806, 813 (1996). But the Supreme Court has allowed a "purpose inquiry in [the 'special needs'] context [if] conducted only at the programmatic level," cautioning that such an inquiry "is not an invitation to probe the minds of individual officers acting at the scene." *Edmond,* 531 U.S. at 48. We therefore look to Oregon law to determine whether "a child protective services search is so intimately intertwined with law enforcement" as to render the "special needs" doctrine inapplicable. *Roe,* 299 F.3d at 407. Our review of Oregon's statutory scheme convinces us that the involvement of law enforcement in this case is symptomatic of the broader entanglement of law enforcement and social services officials in the state's investigation of child abuse.

Under Oregon law, an investigation into alleged abuse begins when a mandatory reporter[14] contacts either "the local office of the Department of Human Services" or "a law enforcement agency within the county." OR. REV. STAT. § 419B.015.[15] Once a report is received, the Department must notify a law enforcement agency, and vice versa. *Id.* Reports are then accorded priority based upon criteria, established by the department, that "enable[s] the department, the designee of the department or a law enforcement agency to quickly and easily identify reports that require notification within 24 hours after receipt." § 419B.017. Either "the department or the agency shall immediately cause an investigation to be made to determine the nature and cause of the abuse of the child." § 419B.020(1). "If the law enforcement agency conducting the investigation finds reasonable cause to believe that abuse has occurred, the law enforcement agency shall notify . . . the local office of the department," which "shall provide protective social services of its own or of other available social agencies to prevent further abuses." § 419B.020(3).

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[14] A "mandatory reporter" is "[a]ny public or private official having reasonable cause to believe that any child with whom the official comes in contact has suffered abuse or that any person with whom the official comes in contact has abused a child." See OR. REV. STAT. § 419B.010. With certain exceptions, any official with such knowledge "shall immediately report or cause a report to be made" to DHS or local law enforcement. *Id.*

[15] All the remaining citations in this paragraph are also to Oregon Revised Statutes.

Either the law enforcement agency or the department may also take protective custody of the child. § 419B.020(5)(a). If either an officer or a caseworker "has reasonable cause to believe that the child has been affected by sexual abuse . . . and that physical evidence of the abuse exists and is likely to disappear, the court may authorize a physical examination for the purposes of preserving evidence . . . " § 419B.020(6). Moreover, any "person conducting an investigation" under the statute who "observes a child who has suffered suspicious physical injury . . . shall [i]mmediately photograph or cause to have photographed the suspicious physical injuries . . . and [e]nsure that a designated medical professional conducts a medical assessment within 48 hours . . . " §§ 419B.023, 419B.028. Once photographs are taken, the officer or caseworker "shall . . . place hard copies or prints of the photographs . . . in any relevant files pertaining to the child maintained by the law enforcement agency or the department." § 419B.028(2)(b).

The Fifth Circuit, reviewing similar provisions for investigating child abuse under Texas law, held that such joint investigations were not "divorced from the state's general interest in law enforcement," because they functioned "as a tool both for gathering evidence for criminal convictions and for protecting the welfare of the child." *Roe*, 299 F.3d at 406-07 (quotation omitted). We reach the same conclusion here. Oregon's statutory scheme makes no effort to distinguish between criminal investigations of child abuse and civil investigations to protect the victims of

abuse. To the contrary, the provisions described above encourage entanglement between law enforcement and social service workers, by involving both police officers and caseworkers in the gathering and collection of evidence of child sexual abuse from the outset of an investigation.

We do not mean to express any negative judgment concerning the wisdom of Oregon's policy. It may well be that fostering coordination and collaboration between caseworkers and law enforcement officers is an effective way both to protect children and to arrest and prosecute child abusers – each, of course, governmental activity of the highest importance. But we do hold that state officials using such a policy cannot thereby forge an exception to traditional Fourth Amendment protections for the criminal investigation of child sexual abuse, as they seek to do here. Again, "[t]he fact that the suspected crime may be heinous . . . does not provide cause for the state to ignore the rights of the accused or any other parties." *Wallis*, 202 F.3d at 1130.

This is not to say, of course, that the seizure of S.G. was unconstitutional "simply because, in the course of [investigating], an inspecting officer may discover evidence of crimes." *Burger*, 482 U.S. at 716. Any time a government official suspects that a child has been abused, investigation of that abuse for child protection purposes may uncover evidence of a crime. Nor do we suggest that a caseworker conducting an investigation to ensure the welfare of the child is precluded from sharing the fruits of that investigation

with law enforcement officers, who may subsequently use such information to prosecute the offender. *See Ferguson,* 532 U.S. at 80-81, 85; *id.* at 90 (Kennedy, J., concurring).[16]

Rather, we hold, as we did in *Calabretta,* that "the general law of search warrants applie[s] to child abuse investigations." *Calabretta,* 189 F.3d at 814. Once the police have initiated a criminal investigation into alleged abuse in the home, responsible officials must provide procedural protections appropriate to the criminal context. At least where there is, as here, direct involvement of law enforcement in an in-school seizure and interrogation of a suspected child abuse victim, we simply cannot say, as a matter

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[16] Mandatory reporting laws, which require public and private officials to contact the authorities if they have reasonable grounds to suspect that a child is being abused, *see, e.g.*, OR. REV. STAT. § 419B.010, do not raise the constitutional concerns discussed in the text. As the Supreme Court carefully noted in Ferguson, mandatory reporters come across such information in the course of their normal business and do not intend to elicit or coerce such statements. *See* 532 U.S. at 78 n.13, 80-81; *id.* at 90 (Kennedy, J., concurring). Nothing in our opinion today would prevent a teacher, for example, from discussing suspected abuse with a student or from passing along any such information to social service workers. For "[w]hen a parent sends her child to school, she delegates some of her parenting responsibilities to school officials. Though she does not consent to overzealous investigators interrogating her children over the principal's objection . . . , she should reasonably expect that school officials will speak with her child if the child raises serious concerns about her home life." *United States v. Hollingsworth,* 495 F.3d 795, 802 (7th Cir. 2007).

of law, that she was seized for some "special need[ ], beyond the normal need for law enforcement." *Ferguson*, 532 U.S. at 74 n.7.

In short, applying the traditional Fourth Amendment requirements, the decision to seize and interrogate S.G. in the absence of a warrant, a court order, exigent circumstances,[17] or parental consent[18] was unconstitutional. We follow the lead of our sister circuits and hold that in the context of the seizure of a child pursuant to a child abuse investigation, a court order

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[17] Exigent circumstances permit a caseworker to seize a child without a warrant if the caseworker has "reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant." *Rogers*, 487 F.3d at 1294; *see also Burke v. County of Alameda*, 2009 WL 3739333 at *4-5 (9th Cir. 2009) (holding that a child's statements during an interview gave the officer reasonable cause to believe that she was in danger of imminent sexual and physical abuse); *Tenenbaum*, 193 F.3d at 594. The exigent circumstances exception is not applicable here. Defendants waited three days to detain and interrogate S.G. after receiving the initial report from DHS, and then returned her to her parents' custody after the allegedly incriminating interview. Such delays and actions undermine any claimed exigency. *See Rogers*, 487 F.3d at 1296; *Tenenbaum*, 193 F.3d at 595, 605.

[18] S.G.'s parents did not consent to her seizure at school, as defendants did not notify them of the planned interview. The fact that defendants received permission from school officials to conduct the interview does not constitute valid "consent." "The handing over of a child from a public school teacher to another State official . . . is not the equivalent of the consent of the parents." *Tenenbaum*, 193 F.3d at 594 n.9; *see also T.L.O.*, 469 U.S. at 336 (recognizing the limits of the *in loco parentis* doctrine in this context).

permitting the seizure of the child is the equivalent of a warrant.[19] *See, e.g., Tenenbaum,* 193 F.3d at 602; *Doe v. Heck,* 327 F.3d at 517; *Gates v. Texas Dept. of Protective and Regulatory Servs.,* 537 F.3d 404, 429 (5th Cir. 2008). We therefore reverse the district court to the extent that it held that Alford and Camreta had not violated S.G.'s right to be free from an unconstitutional seizure.

B. Qualified Immunity

Even where, as here, government officials have violated citizens' constitutional rights, "[t]he doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson,* 129 S. Ct. at 815 (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). "[Our] inquiry turns on the 'objective legal

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[19] Here, for instance, Or. Rev. Stat. § 419B.045 specifically authorizes caseworkers to investigate reports of child abuse on public school premises. Section 419B.150 permits an employee of the Department of Human Services or other officer to take a child into protective custody upon an order by the juvenile court. As the statutory scheme thus permits a caseworker to seek a court order for temporary protective custody and permits in-school interviews, it appears that a caseworker could obtain a court order for an in-school interview that complies with the constitution by presenting facts, "supported by Oath or affirmation," to a judge, which facts constitute probable cause to suspect the child has been abused.

reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'" *Id.* at 822 (quoting *Wilson v. Layne*, 526 U.S. 603, 614 (1999)); *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987). If a government official "could . . . have reasonably but mistakenly believed that his or her conduct did not violate a clearly established constitutional right," he is entitled to qualified immunity. *Jackson v. City of Bremerton*, 268 F.3d 646, 651 (9th Cir. 2001).

The Greenes bear the burden of demonstrating that the right allegedly violated was clearly established at the time of the incident. *See Galen v. County of Los Angeles*, 477 F.3d 652, 665 (9th Cir. 2007). To meet this burden, the Greenes cite only two cases: our prior decisions in *Wallis* and *Calabretta*. Yet, as defendants correctly argue, neither case is directly applicable, as both involved children seized or searched in their homes. *See Wallis*, 202 F.3d at 1134; *Calabretta*, 189 F.3d at 810. *Calabretta* mentioned this distinction in declining to follow the Seventh Circuit's decision in *Darryl H.*, which permitted in school investigations of child abuse based upon a showing of reasonableness, on the grounds that search and seizure at issue in *Darryl H.* "was not done during an unconstitutional entry into the home." 189 F.3d at 818.

A case directly on point is not necessary to show that a right was "clearly established." *See Anderson*, 483 U.S. at 640. But neither *Wallis* nor *Calabretta* would have put Camreta and Alford on notice that a

social worker's warrantless seizure of a child at her school, even in conjunction with a law enforcement officer, could violate the Fourth Amendment. Some other circuits have applied the "special needs" reasonableness standard to investigations of child abuse, *see supra* note 11. The fact that other courts "disagree[ ] about the contours of a right does not automatically render the law unclear," but here, "these differences of opinion from our own are substantial enough to require immunity." *Redding*, 129 S.Ct. at 2644.

The qualified immunity inquiry cannot end there, however. If the defendants' actions were clearly unconstitutional even on the lesser, "special needs" reasonableness standard they regard – incorrectly, as we have held – as applicable, then qualified immunity would not be available. Their actions could not then be said to be "reasonabl[e], but mistaken[ ]" with regard to whether S.G.'s constitutional rights were violated. *Jackson v. City of Bremerton*, 268 F.3d at 651.

Under the lesser standard of reasonableness applicable in "special needs" cases, we conduct a "twofold inquiry" to determine whether a warrantless search is "reasonable": "first, [we] must consider whether the action was justified at its inception; second, [we] must determine whether the search [or seizure] as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place." *T.L.O.*, 469 U.S. at 341 (internal quotations and citations omitted). Accepting the facts in the light most favorable to S.G., she was

kept for two hours in a closed room by two people she did not know: a caseworker and a uniformed police officer carrying a firearm. Applying the *T.L.O.* standard, Camreta and Alford could have reasonably believed that the decision to seize S.G. was sufficiently justified at its inception. Whether they could reasonably have regarded the seizure "as actually conducted" as reasonable in scope is a considerably closer question, for several reasons.

First, neither Camreta nor Alford have provided any explanation for Deputy Sheriff Alford's presence at the interview. Defendants emphasize that Alford "did not participate in the interview" and "just sat there without asking any questions." These assertions support rather than detract from the conclusion that the seizure was not "reasonably related" to defendants' claimed justification for interfering with S.G.'s liberty interests. Nothing in the record – or common sense – suggests that the silent presence of a uniformed, armed police officer at an interview of a child in a grade school is helpful in any legitimate way to determining whether the child needs child protective services.

Second, the justification in the record for a seizure lasting two hours is weak. Most of the cases relied upon by Camreta and Alford do not address such a prolonged seizure. *See Hassan*, 55 F.3d at 1078, 1080 (holding the detention of a student for disciplinary reasons for 50 minutes reasonable); *Doe v. Bagan*, 41 F.3d 571, 574-75 (10th Cir. 1994) (holding caseworker's decision to seize and question student

alone in the principal's office for ten minutes reasonable); *Edwards v. Rees*, 883 F.2d 882, 884 (10th Cir. 1989) (holding vice principal's twenty-minute interrogation of student alleged to have made bomb threat reasonable). To the contrary, these cases held that the challenged seizures were reasonable in scope precisely because they were "brief," noting, for example, that a "ten minute initial interview with a social services caseworker . . . [is] a de minimis interference with [a student's] liberty, insufficient at that stage to trigger constitutional liberty concerns." *Bagan*, 41 F.3d at 575. The seizure of S.G., who was not herself suspected of any crime, lasted considerably longer than that.

Other cases cited by defendants, however, come closer to sanctioning a two-hour seizure, although the circumstances were quite different. *Wofford v. Evans*, for example, involved the investigatory detention of a student who had allegedly brought a gun to school. *See* 390 F.3d at 321. The student claimed to have been detained for an hour and a half while school officials and law enforcement officers searched the school grounds for a gun. The Fourth Circuit held the detention reasonable in scope because "school officials detained the pupil no longer than necessary to obviate [the unacceptable risk of her retrieving the weapon or revealing its location to a peer]." *Id.* at 327; *see also Shuman v. Penn Manor Sch. Dist.*, 422 F.3d 141, 149 (3d Cir. 2005) (finding a detention lasting "no more than four hours" reasonable); *Couture v. Bd. of Educ. of Albuquerque Pub. Schs.*, 535 F.3d

1243, 1254 (10th Cir. 2008) (holding that a school that had "barricade[d a child] in a closet-like timeout room for one hour and thirty-five minutes" was not unreasonable).

Camreta and Alford seek to justify the length of the seizure by pointing out that as the interview progressed, S.G. began disclosing sexual abuse by her father. S.G. maintains that for "over an hour" she repeatedly told Camreta that her father had never touched her in a bad way until she finally "just started saying yes to whatever he said." It is far from clear that it was reasonable for Camreta and Alford to continue to detain S.G. for an entire hour during which she continually denied such abuse, even if it was reasonable to continue the interview once she started to say otherwise. Still, there is some case law applying the *T.L.O.* standard sanctioning a detention longer than an hour, and none refuting the justification Camreta and Alford offer for prolonging the detention beyond that – namely, that S.G. was just becoming – in their view – responsive.

We are also mindful of the difficult task facing social services caseworkers, who are required to exercise significant discretion in determining whether a child's welfare is in jeopardy. As the Second Circuit has explained,

> Protective services caseworkers [must] choose between difficult alternatives. . . . If they err in interrupting parental custody, they may be accused of infringing the parents' constitutional rights. If they err in not removing

> the child, they risk injury to the child and may be accused of infringing the child's rights. It is precisely the function of qualified immunity to protect state officials in choosing between such alternatives, provided that there is an objectively reasonable basis for their decision, whichever way they make it.

Tenenbaum, 193 F.3d at 596 (quoting *van Emrik v. Chemung County Dep't of Soc. Servs.,* 911 F.2d 863, 866 (2d Cir. 1990)) (alterations in original).

For all these reasons, we hold that defendants in this case are entitled to qualified immunity. We hasten to note that government officials investigating allegations of child abuse should cease operating on the assumption that a "special need" automatically justifies dispensing with traditional Fourth Amendment protections in this context. As noted, we rejected such a claim in *Calabretta,* where state officials argued that "any check on the welfare of children" triggered the "exigent circumstances" exception to the warrant requirement and that seizures conducted during investigations of child abuse were "administrative searches" subject to some lesser standard of reasonableness. 189 F.3d at 811-12. We have never adopted such an exception to traditional Fourth Amendments [sic] standards, and our decision today makes clear that we are unwilling to create an across-the-board exception because a student happens to be seized at a public school rather than on private property.

Because our precedent did not clearly establish that the in-school seizure of a student suspected of being the victim of child sexual abuse can be subject to traditional Fourth Amendment protections, and because, applying the lesser *T.L.O.* standard, the defendants' actions were not so clearly invalid as to strip them of immunity, we affirm the district court's ruling that defendants are entitled to qualified immunity on the Greenes' Fourth Amendment claim.

C. The Removal of S.G. and K.G. from Sarah's Custody

The Greenes also argue that their constitutional rights were violated because S.G. and K.G. were removed from Sarah's custody pursuant to a Juvenile Court order triggered by an intentional misrepresentation by Camreta. In an affidavit provided to the Juvenile Court, Camreta stated that "[Sarah] indicated the family had no alternate resources for either the children or Nimrod to ensure there would be no contact." The Greenes maintain that this representation was materially false, contending that (1) Sarah had agreed to Camreta's proposed "safety plan," under which Nimrod would not have any unsupervised contact with his daughters; and (2) Sarah told Camreta that, even though "it would be significantly detrimental to [the] family finances," she had secured "a place where [Nimrod] could stay so that he would have no contact with [S.G. and K.G.]."

Camreta argues that he is entitled to absolute quasi-judicial immunity for removing the children from the Greene home. A recent en banc decision of this court compels the opposite conclusion.

In *Beltran v. Santa Clara County*, 514 F.3d 906 (9th Cir. 2008) (en banc), we held:

> Parties to section 1983 suits are generally entitled only to immunities that existed at common law. We have therefore granted state actors absolute immunity only for those functions that were critical to the judicial process itself, such as initiating a prosecution. It follows that social workers have absolute immunity when they make discretionary, quasiprosecutorial decisions to institute court dependency proceedings to take custody away from parents. But they are not entitled to absolute immunity from claims that they fabricated evidence during an investigation or made false statements in a dependency petition affidavit that they signed under penalty of perjury, because such actions aren't similar to discretionary decisions about whether to prosecute. A prosecutor doesn't have absolute immunity if he fabricates evidence during a preliminary investigation, before he could properly claim to be acting as an advocate, or makes false statements in a sworn affidavit in support of an application for an arrest warrant. Furthermore, as prosecutors and others investigating criminal matters have no absolute immunity for their investigatory conduct, a

> fortiori, social workers conducting investigations have no such immunity.

Id. at 908-09 (internal citations and quotations omitted). According to the Greenes, Camreta falsely represented that he had been told the family lacked the financial resources to comply with the safety plan, even though Sarah in fact gave repeated assurances that her husband would live elsewhere and have no contact with her daughters. Assuming, as we must, that Sarah's version of events is true, under *Beltran* such a misrepresentation falls outside the scope of the absolute immunity afforded caseworkers.

Camreta relies on our pre-*Beltran* decision in *Mabe v. San Bernardino County Department of Public Social Services*, 237 F.3d 1101 (9th Cir. 2001), for the proposition that "social workers enjoy absolute, quasi-judicial immunity when making post-adjudication custody decisions pursuant to a valid court order." *Id.* at 1109 (internal quotation omitted). *Mabe* provides no support for Camreta's position in this case for two reasons. First, the quoted passage refers specifically to post-adjudication conduct, whereas the Greenes allege that Camreta misrepresented the fruits of his investigation before the Juvenile Court's adjudication of the protective custody order. Second, *Mabe* itself distinguished the presentation of false evidence from other, discretionary decisions made by caseworkers during a child abuse investigation: *Mabe* held that "social workers are entitled to absolute immunity for the initiation and pursuit of dependency proceedings," as well as any "post-adjudication custody decisions,"

but noted that plaintiff's allegations of false evidence in that case failed only "because [plaintiff] failed to offer any evidence of false or perjured testimony" by the caseworker. *Id.*

Camreta is not entitled to qualified immunity as to the false representation claim, as the Greenes' right to be free from judicial deception in securing the removal order was clearly established at the time of Camreta's alleged misrepresentations to the court. We have repeatedly held that "[a] seizure conducted pursuant to a warrant obtained by judicial deception violates the Fourth Amendment." *Whitaker v. Garcetti*, 486 F.3d 572, 581 (9th Cir. 2007) (citing *Butler v. Elle*, 281 F.3d 1014, 1024 (9th Cir. 2002) (per curiam)). "To support a § 1983 claim of judicial deception, a plaintiff must show that the defendant deliberately or recklessly made false statements or omissions that were material to the finding of probable cause." *KRL v. Moore*, 384 F.3d 1105, 1117 (9th Cir. 2004), citing *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1126 (9th Cir. 2002). Whether a false statement was "material" to the finding of probable cause is a question of law for the reviewing court. *KRL*, 384 F.3d at 1117; *Butler*, 281 F.3d at 1024.

More specifically, the right to be free from deception in the presentation of evidence during a protective custody proceeding was clearly established at the time Camreta filed his affidavit with the Juvenile Court. In *Devereaux v. Perez*, 218 F.3d 1045 (9th Cir. 2000), for example, we held in the context of a child abuse proceeding that "the constitutional right to be

free from the knowing presentation of false or perjured evidence" is clearly established. *Id.* at 1055-56. Even earlier, we stated emphatically that "if an officer submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth, . . . he cannot be said to have acted in an objectively reasonable manner, and the shield of qualified immunity is lost." *Hervey v. Estes*, 65 F.3d 784, 788 (9th Cir. 1995) (internal quotations and citation omitted); *see also Butler*, 281 F.3d at 1024; *Whitaker*, 486 F.3d at 582 (concluding that "the contours of the Fourth Amendment right against judicial deception" were clearly established by 1996). *See also Snell v. Tunnell*, 920 F.2d 673 (10th Cir. 1990) (holding social workers who deliberately fabricated evidence of child sexual abuse to secure a removal order not entitled to qualified immunity).

The Greenes have presented proof, in the form of Sarah's affidavit and deposition testimony, that Camreta included false statements in his affidavit requesting a protective custody order. According to Sarah, she told Camreta that there was a place for Nimrod to stay so that he would not have any contact with their daughters. Camreta's sworn affidavit states precisely the opposite, claiming that Sarah indicated the family lacked the financial resources to secure alternate housing for Nimrod. These conflicting accounts of the same conversation create a genuine factual dispute as to whether Camreta intentionally or recklessly misrepresented his conversations with

Sarah in an effort to persuade the court to remove the children from her custody.[20]

The alleged misrepresentation was "material" to the granting of the removal order if the Juvenile Court would have declined to issue the order had Camreta been truthful. *See Butler*, 281 F.3d at 1026. The sole evidence presented against Sarah's continued custody of her daughters consisted of Camreta's contested assertion that she was unwilling or unable to prevent Nimrod from having contact with her daughters.[21] There was no basis for the Juvenile Court to remove S.G. and K.G. from *Sarah*'s custody, unless Sarah was failing to take the requisite steps to protect her daughters from Nimrod. "The government may not, consistent with the Constitution, interpose itself between a fit parent and her children simply

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[20] If Camreta did not misrepresent what Sarah told him, or if he negligently misrepresented her statements, his conduct did not violate the Constitution. But whether either is the case is a question for the trier of fact, not for this court. *See Butler*, 281 F.3d at 1024.

[21] This issue is complicated by the fact that the record does not contain any evidence regarding Sarah's response to Camreta's claims at the Juvenile Court hearing. The record indicates that Sarah was present and represented by counsel, and she presumably had an opportunity to rebut Camreta's assertions. Transcripts from the Juvenile Court hearing were not included in the district court record, so it is impossible to know whether or how Sarah responded to Camreta's version of the events at issue. If Sarah essentially ratified Camreta's account of their March 7 conversation at the hearing, Sarah's claim that Camreta intentionally misrepresented her statements to the Juvenile Court would be refuted.

because of the conduct – real or imagined – of the other parent." *Wallis*, 202 F.3d at 1142 n.14. Camreta's alleged misrepresentation provided crucial evidence for determining whether the girls remained in sufficient danger in Sarah's custody to warrant a protective custody order. In all likelihood, the Juvenile Court would not have issued its order absent Camreta's allegation that Sarah was unable to provide alternate housing for Nimrod.

Because Camreta's alleged misrepresentation in support of his request for a protective custody order – again, assuming it occurred – violated the Greenes' clearly established rights, he is not entitled to qualified immunity. The district court's grant of summary judgment to Camreta on the Greenes' Fourteenth Amendment claims stemming from the removal order is therefore reversed.

D. The Children's Medical Examinations Outside Their Mother's Presence

Finally, the Greenes assert a separate claim under the Fourteenth Amendment premised on Camreta's decision to exclude Sarah from her daughters' physical examinations at the KIDS Center. Specifically, the Greenes argue that Sarah's exclusion violated her "substantive due process right to be there for her children," as well as S.G. and K.G.'s right "to have their mother there when they face

potentially traumatic events, such as the exams [performed at the KIDS Center]." We agree.[22]

Wallis directly addressed the constitutionality of investigatory physical examinations of children outside their parents' presence. We stated:

> [P]arents have a right arising from the liberty interest in family association to be with their children while they are receiving medical attention (or to be in a waiting room or other nearby area if there is a valid reason for excluding them while all or a part of the medical procedure is being conducted). Likewise, children have a corresponding right to the love, comfort, and reassurance of their parents while they are undergoing medical procedures, including examinations – particularly those ... that are invasive or upsetting. The interest in family association is particularly compelling at such times, in part because of the possibility that a need to make medical decisions will arise, and in part because of the family's right to be together during such difficult and often traumatic events.

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[22] Camreta initially argued that he was entitled to absolute, quasi-judicial immunity for executing the Juvenile Court's order, but at oral argument conceded that he is not. The concession is well-taken. Camreta was not executing a court order when he made the decision to exclude Sarah from the KIDS Center assessments, as the order said nothing about excluding Sarah from the examinations.

Wallis, 202 F.3d at 1142. This passage from *Wallis* establishes two points central here: first, parents and children maintain clearly established familial rights to be with each other during potentially traumatic medical examinations; and second, this right may be limited in certain circumstances to presence nearby the examinations, if there is some "valid reason" to exclude family members from the exam room during a medical procedure.

Even if Camreta had a valid reason to exclude Greene from K.G.'s medical exam, which we do not decide, *Wallis* held that parents have a right to be present at medical examinations of their children *or* "to be in a waiting room or other nearby area if there is a valid reason for excluding them." *Id.* at 1142. In this case, according to Sarah, she "was ordered by the staff of the KIDS Center, who were under orders of Bob Camreta, to leave the premises" entirely, depriving her of any opportunity to comfort her children even after the examinations had been completed. Prohibiting Sarah from remaining in an adjoining or nearby room violated her constitutional right under *Wallis*.

The language of *Wallis* is clear and unambiguous: government officials cannot exclude parents entirely from the location of their child's physical examination absent parental consent, some legitimate basis for exclusion, or an emergency requiring immediate medical attention. *Id.* at 1141-42. The KIDS Center assessments involved the visual inspection and photographing of the children's genitals. This process could

certainly be emotionally traumatic to a young girl. *Cf. Redding*, 129 S.Ct. at 2642 (citing a study concluding that strip searches can "result in serious emotional damage."). The children's right to their mother's comfort and their mother's right to provide such comfort were thus at their apex. Camreta's decision to exclude Sarah not just from the examination but from the entire facility where her daughter was being examined violated the Greenes' clearly established rights.[23]

We therefore reverse the district court's grant of summary judgment to Camreta on this claim as well.

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[23] We note that there was no state administrative rule to the contrary. Oregon Administrative Rule 413 015-0720 sets forth "interviewing rules" for child protective services, providing, *inter alia*, that "[i]f the parent or caregiver is the alleged abuser or if the presence of the parent or caregiver might impede the interview, the CPS worker may interview children independent of their parents or caregivers." OR. ADMIN. R. 413-015-0720(4) (2003). These rules were intended to govern initial interviews with victims of suspected abuse, a point made quite clear by the very next sub-part of the rule, which provides separate guidelines for initial physical examinations. *See* OR. ADMIN. R. 413-015-0720(5) (2003). The State's regulatory scheme thus reflected a concern that the presence of a victim's parents might impermissibly influence the child's answers to a caseworker's questions, not a license to exclude a parent from the premises on which a physical examination is occurring. (These regulations have been revised and now appear at OR. ADMIN. R. 413-015-0420 and OR. ADMIN. R. 413-015-0415.)

III. Conclusion

In sum, we hold that Camreta and Alford are entitled to qualified immunity with respect to S.G.'s Fourth Amendment claims and affirm the district court's grant of summary judgment on that basis. With respect to the Greenes' Fourteenth Amendment claims regarding the removal order, we conclude that there is a genuine issue of material fact as to whether Camreta secured the order by misrepresenting his conversations with Sarah. We therefore reverse the district court's grant of summary judgment on that claim. Finally, we hold that Camreta's decision to exclude Sarah from her daughters' medical examinations at the KIDS Center violated the Greenes' clearly established familial rights under the Fourteenth Amendment. We therefore reverse the district court's grant of summary judgment on that claim as well.

AFFIRMED in part, **REVERSED** in part, and **REMANDED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Plaintiff,

v.

BOB CAMRETA; DESCHUTES COUNTY DEPUTY SHERIFF JAMES ALFORD; DESCHUTES COUNTY; JANE DOE; BOB SMIT; THE KIDS CENTER; THE BEND-LaPINE SCHOOL DISTRICT; and TERRY FRIESEN,

Defendants.

Civ. No. 05-6047-AA

OPINION AND ORDER

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AIKEN, Judge:

Plaintiff filed this suit on behalf of herself and her minor children, S.G. and K.G., pursuant to 42 U.S.C. § 1983, alleging that defendants violated their constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution. Plaintiff also alleges state law claims of false imprisonment and intentional infliction of emotional distress against defendants Bob Camreta and

Deschutes County Deputy Sheriff James Alford. Pursuant to the court's Opinion and Order dated September 22, 2005, defendants Bob Smit and the KIDS Center are no longer parties to this action. All remaining defendants now move for summary judgment on each of plaintiffs' claims pursuant to Fed. R. Civ. P. 56© [sic]). For the following reasons, defendants' motions are granted.

BACKGROUND

On February 12, 2003, Nimrod Greene, plaintiff's husband and the father of S.G. and K.G., was arrested for suspected sexual abuse of F.S, a seven-year-old child.

On February 20, 2003, the Oregon Department of Human Services (DHS) received a report from the Deschutes County Sheriff's Office describing the circumstances of Greene's arrest and reporting possible sexual abuse of S.G. and K.G. by Greene.

On February 21, 2003, Bob Camreta, a Child Protective Services (CPS) caseworker for DHS, learned that Greene had been released on bail and was at home having unsupervised contact with S.G. and K.G, who were nine and five years old at the time, respectively.

On February 24, 2003, Camreta interviewed S.G. at her public elementary school. Camreta was attempting to assess whether S.G. and K.G. had been abused by Greene, and he did not seek or obtain

parental consent for the interview. Upon Camreta's request, defendant Terry Friesen, a female counselor at Elk Meadow Elementary School, walked to S.G.'s classroom and asked S.G. to accompany Friesen so that someone could talk to her. S.G. complied, and Friesen brought her to another room where defendants Camreta and Deputy Alford were present. Friesen then left the room.

For approximately one to two hours, S.G. sat at a table with Camreta while he interviewed her. According to Camreta, S.G. disclosed that she had been sexually abused by her father at her home, and that the last time it occurred was "last week." Affidavit of Bob Camreta (Camreta Aff.), ¶ 5. S.G. stated that the "touching" occurred after her father had been drinking alcohol, and that S.G. had told plaintiff about the touching. *Id.* and Ex. 3.

After the interview, Camreta, accompanied by Deputy Alford, spoke with plaintiff and Greene about S.G.'s statements. Both parents denied sexual abuse, but plaintiff agreed to a safety plan requiring that Greene not have unsupervised contact with the children pending an investigation. The plan also provided that S.G. would undergo a sexual abuse examination at the KIDS Center, a medical center specializing in child sex abuse. Camreta advised plaintiff not to discuss the alleged abuse with S.G. or K.G.

On March 6, 2003, an indictment was returned charging Greene with six counts of felony sexual

abuse in the first degree against F.S. and S.G. Following the indictment, Greene was released pursuant to a court-ordered agreement, dated March 19, 2003, requiring that he have no contact with children, including S.G. and K.G.

On March 7, 2003, Camreta went to plaintiff's home to assess whether she would comply with the no-contact order. Plaintiff stated to Camreta that the charges were a lie, that she had hired an attorney to defend her husband, and that she had talked to S.G. about the alleged abuse. Plaintiff told Camreta that she had no extra resources for alternative housing for Greene and would not sign the information release form for the sexual abuse examination. Plaintiff asserts that she did, however, also tell Camreta that Greene would have no contact with the children and that she would find alternative housing regardless of the cost.

On March 11, 2003, Camreta successfully petitioned the Deschutes County Juvenile Court for an order to place S.G. and K.G. in protective custody. The same day, S.G. and K.G. were taken into DHS custody pursuant to the court order.

On March 12, 2003, the Deschutes County Juvenile Court held an Emergency Shelter Hearing, at which plaintiff, Greene, and their attorneys appeared. Following the hearing, the court issued an order keeping the children in state custody and ordering sexual abuse examinations of both S.G. and K.G.

The children were in state custody from March 11, 2003, through March 31, 2003, and during that time plaintiff's contact with them was limited to pre-arranged, supervised visitation, and she was not allowed to be present during their evaluation at the KIDS Center. K.G. was interviewed and examined on March 20, 2003, and S.G. was examined on March 31, 2003. During her examination, K.G. informed doctors that S.G. had lied about the sexual abuse allegations, because she overheard plaintiff telling S.G. that she had lied. Camreta Aff., Ex. 10, p. 9. Ultimately, the KIDS Center evaluators were unable to determine if S.G. and K.G. had been sexually abused, and S.G. recanted the statements she had previously made to Camreta.

On March 31, 2003, a hearing was held at the Deschutes County Juvenile Court, which Camreta, plaintiff, Greene, and their attorneys attended, along with an attorney for S.G. and K.G. The court ordered that S.G. and K.G. be returned to the custody of their mother at the request of all parties present at the hearing.

On February 24, 2005, plaintiff filed this action.

STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

a judgment as a matter of law." Fed. R. Civ. P. 56© [sic]). The materiality of a fact is determined by the substantive law on the issue. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Assoc.*, 809 F.2d 626, 630 (9th Cir. 1987). The authenticity of a dispute is determined by whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *T.W. Elec. Serv.*, 809 F.2d at 630-31.

DISCUSSION

A. Fourth Amendment Claims

1. Individual Defendants

In Counts 1 and 3, plaintiff alleges that defendants Camreta, Deputy Alford, and Friesen violated

S.G.'s right to be free from unreasonable seizure under the Fourth Amendment to the United States Constitution when S.G. was interviewed at her school.

Under the Fourth Amendment, a seizure occurs when an individual's freedom of movement is restrained by physical force or show of authority. *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). A person has been "seized" only if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." *Id.* at 554. Thus, an objective standard applies in determining whether a seizure occurred. *See id.* at 554-55.

I find that the evidence presented supports a finding that S.G. was seized. S.G. was escorted from her classroom by her school counselor and taken to a room where she was interviewed for approximately one to two hours by a CPS caseworker in the presence of a sheriff's deputy. Although plaintiff presents no evidence that defendants had any physical contact with S.G., told S.G. she was not free to leave, or suggested she could not leave, I question whether any reasonable nine-year old would believe that she was free to leave under those circumstances. *See Doe v. Heck*, 327 F.3d 492, 510 (7th Cir. 2003) (removal of 11-year old boy from classroom and questioning by caseworkers and uniformed police officer constituted seizure under the Fourth Amendment).

However, I do not find that the seizure of S.G. was unreasonable in light of the circumstances and the information known to Camreta. A seizure violates the Fourth Amendment only if it is objectively unreasonable in light of the facts and circumstances confronting the defendants, regardless of subjective intent or motivation. *See Graham v. Connor,* 490 U.S. 386, 397 (1989) (citing *Scott v. United States,* 436 U.S. 128, 137-39 (1978)). A seizure is reasonable if it was "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio,* 392 U.S. 1, 20 (1968).

For example, in *Doe v. Bagan,* a child, Doe, brought suit under § 1983 after a social services worker questioned him for his alleged sexual abuse of another child. 41 F.3d 571, 573 (10th Cir. 1994). The social services worker interviewed Doe alone in the principal's office for approximately ten minutes with the door closed. *Id.* at 574. The Tenth Circuit found that this seizure was reasonable as a matter of law. *Id.* at 574 n.3. Specifically, the court found that the seizure was justified at its inception because the abused child specifically identified Doe as her abuser and that the interview was reasonably related in scope to determine Doe's involvement in the incident. *Id.*

Likewise, I find that the interview of S.G. was justified at its inception. It is undisputed that defendants were responding to the recent arrest of Greene for sexually abusing another child, along with

information suggesting that S.G. and K.G. were being sexually abused by Greene and that plaintiff had knowledge of the abuse. Camreta Aff., Ex. 2, p. 1. Thus, the information known to Camreta and Deputy Alford gave rise to reasonable suspicion that the children had been abused or were in danger of being abused. *See Wallis v. Spencer,* 202 F.3d 1126, 1138 (9th Cir. 2000). Further, Camreta and Deputy Alford received permission from school officials to speak with S.G. regarding the alleged abuse.

I also find that the scope of the interview was reasonably related to determining whether such abuse had occurred. Given S.G.'s statements and disclosures regarding sexual abuse by Greene and plaintiff's knowledge of that abuse, it is not unreasonable that the interview lasted one to two hours. Camreta was not only attempting to protect S.G. from possible sexual abuse, he was fulfilling his statutory duty to investigate suspected sex abuse of a minor. *See* Or. Rev. Stat. § 419B.020 (requiring DHS or law enforcement to investigate a claim of child abuse immediately after a report has been made); Camreta Aff., ¶ 2. For the same reasons, defendants Friesen's and Deputy Alford's actions to facilitate this interview were likewise reasonable. Therefore, even though S.G. was seized, I find that the seizure was objectively reasonable under the facts and circumstances of this case.

Moreover, defendants Camreta, Deputy Alford, and Friesen are entitled to qualified immunity. Assuming a constitutional violation occurred, the

court considers two issues: (1) whether the law governing the official's conduct was clearly established; and (2) whether, under that law, a reasonable official could have believed his or her conduct was lawful. *Mena v. City of Simi Valley,* 226 F.3d 1031, 1036 (9th Cir. 2000); *see also Saucier v. Katz,* 533 U.S. 194, 201 (2001). Qualified immunity is intended to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

Oregon law expressly permits CPS workers to interview a child at school "when the worker believes it will be the best environment in which to make contact with the child." Or. Admin. R. 413-015-0610. While the school administrator must be notified of such an interview, Oregon law does not always require notice to the child's parents. *See* Or. Rev. Stat. § 419B.045 (requiring notice to the school administrator, but failing to require any notice to the child's parents); *see also* Or. Admin. R. 413-015-0405(8) (giving CPS employees discretion not to notify parents of an interview when notification could compromise the child's safety or a criminal investigation).

Given this statutory and administrative authority, I find as a matter of law that a reasonable official could believe his or her actions pursuant to this authority are within constitutional bounds. *Heck,* 327 F.3d at 516. Plaintiff raises no challenge to any of these statutes or administrative rules, and the court finds no reported decision rendering them unconstitutional. *Id.* Therefore, when Friesen, Camreta, and

Deputy Alford seized and interviewed S.G., no reasonable school official, caseworker, or police officer would have believed these actions violated the Fourth Amendment. Therefore, plaintiff's Fourth Amendment claims against defendants Camreta, Deputy Alford, and Friesen brought on behalf of S.G. are dismissed.

2. Defendants Deschutes County and Bend-LaPine School District

In Counts 2 and 4, plaintiff alleges that Deschutes County and Bend-LaPine School District each have a custom and policy of "seizing children from classrooms and subjecting them to custodial police interrogations without a warrant, parental consent, or probable cause and exigent circumstances" that violated S.G.'s Fourth Amendment rights.

A local government entity may be held liable under § 1983 if the entity itself causes the constitutional violation. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978); *see also Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 403 (1997). Thus, plaintiff cannot rely on theories of respondeat superior or vicarious liability to recover against defendants. *Brown*, 520 U.S. at 403; *Duvall v. County of Kitsap*, 260 F.3d 1124, 1141 (9th Cir. 2001). Rather, plaintiff's § 1983 claim survives only where the alleged constitutional deprivation was inflicted in

"execution of a government's policy or custom." *Monell*, 436 U.S. at 694.

However, plaintiff fails to establish a violation of S.G.'s Fourth Amendment rights or produce evidence that either Deschutes County or the School District has an official policy or custom that authorizes custodial police interrogations as alleged by plaintiff. Likewise, plaintiff fails to show the existence of a widespread practice that is "so permanent and well settled as to constitute a 'custom or usage' with the force of law." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 111, 168 (1970)). Accordingly, plaintiff's Fourth Amendment claims brought against Deschutes County and Bend-LaPine School District on behalf of S.G. are dismissed.

B. Fourteenth Amendment Claims

Plaintiff next alleges that defendants Deschutes County, Bend-LaPine School District, and Camreta violated plaintiff and her children's substantive due process rights under the Fourteenth Amendment to be free from unreasonable interference with the family relationship. Specifically, in Counts 2 and 4, plaintiff alleges that Deschutes County's and the School District's customs and policies of seizing and questioning students violated plaintiff's and S.G.'s Fourteenth Amendment rights.

However, plaintiff cannot obtain relief on behalf of S.G. through a substantive due process claim

under the Fourteenth Amendment when the challenged conduct falls under a more specific constitutional right. *Albright v. Oliver,* 510 U.S. 266, 272-75 (1994); *Graham,* 490 U.S. at 394-95. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" *Albright,* 510 U.S. at 273 (quoting *Graham,* 490 U.S. at 395). Here, the issue of whether Deschutes County and the School District have unconstitutional policies of seizing students for questioning without parental consent implicates S.G.'s Fourth Amendment rights.[1]

With respect to the alleged violation of plaintiff's Fourteenth Amendment rights, as discussed above, plaintiff presents no evidence that either the School District or Deschutes County has a policy or custom permitting the questioning of children without parental consent that unreasonably interferes with a parent's rights to control the care of a child. While the

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[1] In Count 3 of her Complaint, plaintiff alleges that Camreta's interview of S.G. at school violated S.G.'s Fourth Amendment rights. However, in her response to defendants' motions for summary judgment, she states that Count 3 also alleges a Fourteenth Amendment violation. As discussed above, I find that plaintiff cannot pursue a substantive due process claim on behalf of S.G. because the school interview is properly evaluated under the Fourth Amendment. Therefore, I construe Count 3 as alleging only a Fourth Amendment violation.

School District admits that it facilitates law enforcement interviews of students, this policy is contemplated and endorsed by state law. Or. Rev. Stat. § 419B.045. Moreover, the "right to family integrity clearly does not include a constitutional right to be free from child abuse investigations." *Manzano v. South Dakota Dep't of Soc. Servs.*, 60 F.3d 505, 510 (8th Cir. 1995) (internal quotation marks and citation omitted); *see also Wilkinson ex rel. Wilkinson v. Russell*, 182 F.3d 89, 104 (2d Cir. 1999) ("An investigation passes constitutional muster provided simply that case workers have a 'reasonable basis' for their findings of abuse."). Accordingly, plaintiff's Fourteenth Amendment substantive due process claims against Bend-LaPine School District and Deschutes County brought on behalf of herself and S.G. must be dismissed.

In Counts 5 and 7, plaintiff argues that defendant Camreta unreasonably interfered in the family relationship of plaintiff, S.G., and K.G. by: (1) removing S.G. and K.G. from plaintiff's custody, and (2) denying plaintiff's request to be present with S.G. and K.G. during the children's physical examinations at the KIDS Center.[2]

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[2] Plaintiff also alleged a Fourteenth Amendment claim against a Jane Doe defendant based on her participation in the medical examinations of S.G. and K.G. However, plaintiff failed to identify this defendant or present facts or argument supporting the claims against her. Therefore, plaintiff's claims against defendant Jane Doe are dismissed.

It is well-settled that parents and children possess a constitutional right to be together without governmental interference. *Santosky v. Kramer,* 455 U.S. 745, 753 (1982); *Stanley v. Illinois,* 405 U.S. 645 (1972); *Pierce v. Soc'y of Sisters,* 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska,* 262 U.S. 390 (1923). "That right is an essential liberty interest protected by the Fourteenth Amendment's guarantee that parents and children will not be separated by the state without due process of law except in an emergency." *Wallis,* 202 F.3d at 1136. Here, however, plaintiff received due process of law, because S.G. and K.G. were removed from her custody pursuant to a court order, and plaintiff was given the opportunity to be heard at the custody hearing.

Moreover, I find that Camreta is entitled to quasi-judicial immunity for his actions. A CPS worker such as Camreta is accorded absolute quasi-judicial immunity from liability for damages stemming from the worker's apprehension of a child pursuant to a valid court order. *Coverdell v. Dep't of Soc. & Health Servs.,* 834 F.2d 758, 762 (9th Cir. 1987); *Abdouch v. Burger,* 426 F.3d 982, 989 (8th Cir. 2005). "The fearless and unhesitating execution of court orders is essential if the court's authority and ability to function are to remain uncompromised." *Coverdell* 834 F.2d at 765.

Here, it is undisputed that Camreta removed S.G. and K.G. from plaintiff's custody to enforce the court order granting protective custody of the children to the state. Although plaintiff argues that

Camreta obtained the court order by presenting false information to the court and deliberately misrepresenting S.G.'s statements, plaintiff presents no evidence to support these allegations. Furthermore, plaintiff had an opportunity, with counsel, at the March 12, 2003, hearing to challenge the evidence presented in support of the court order.

Likewise, Camreta is entitled to immunity for excluding plaintiff from S.G. and K.G.'s medical examinations. Plaintiff did not have legal custody of the children at the time, the court ordered the examinations of S.G. and K.G., and plaintiff's exclusion from the examinations conformed with Oregon statutory and administrative law. *See* Or. Rev. Stat. § 419B.337 (stating that after a child is placed in state custody, DHS has discretion in the planning and provision of care, supervision, and services); Or. Admin. R. 413-015-0720(4) (allowing DHS workers to exclude an abused child's parent if the parent's presence may impede the interview). Accordingly, plaintiff's Fourteenth Amendment claims against Camreta brought by plaintiff and on behalf of herself, S.G. and K.G. are dismissed.

C. State Law Claims

Finally, plaintiff alleges state law claims of false imprisonment and intentional infliction of emotional distress (IIED) against defendants Camreta and

Deputy Alford based on their interview of S.G. at school.[3]

Pursuant to the Oregon Tort Claims Act (OTCA), Or. Rev. Stat. §§ 30.260-.300, a lawsuit alleging a tort committed by a public body or by its officers, employees, or agents acting within the scope of employment must be brought against the public body only. *Id.* § 30.265(1). A "public body" includes the state, as well as counties, cities, school districts, and other similar entities. *See id.* § 30.260(4). When a tort claim is brought against public employees for actions taken within the scope of their employment, the public body shall be substituted as the only defendant. *Id.* § 30.265(1); *see also Ctr. for Legal Studies, Inc. v. Lindley,* 64 F. Supp. 2d 970, 974-76 (D. Or. 1999). Plaintiff has not disputed that both Camreta and Deputy Alford were acting within the scope of their employment. Therefore, in accordance with the OCTA, the State of Oregon and Deschutes County are substituted as the proper defendants in place of Camreta and Deputy Alford with respect to plaintiff's state law claims.

Upon substitution, plaintiff's tort claims against the State of Oregon based on Camreta's actions must be dismissed under the Eleventh Amendment to the United States Constitution. It is well established that

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[3] Plaintiff has agreed to dismiss her claim of malicious prosecution alleged against defendant Camreta in Count 6 of her Complaint.

a State is immune from claims brought in federal court by a citizen unless the State has given unequivocal consent to be sued or Congress has abrogated the immunity. *See, e.g., Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 540-542 (2002); *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 97-100 (1984). While the State of Oregon has consented under the OTCA to be sued for certain torts in state court, it has not consented to be sued for such claims in federal court. *See* Or. Rev. Stat. § 30.265(1); *see also Blair v. Toran*, 1999 WL 1270802 (D. Or. Dec. 2, 1999). Therefore, plaintiff's state law claims against the State of Oregon on behalf of S.G. are dismissed.

Plaintiff's state law claims against Deschutes County must be dismissed as well. In general, Eleventh Amendment immunity does not apply to counties and similar municipal corporations. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *but see Pennhurst*, 465 U.S. at 123 n.34 (describing cases where immunity applies because the relief obtained runs against the State). However, plaintiff fails to show a genuine issue of material fact as to S.G.'s claims of false imprisonment and IIED.

First, to establish a claim of false imprisonment, plaintiff must show that: (1) Deputy Alford confined S.G.; (2) Deputy Alford intended the acts that caused the confinement; (3) S.G. was aware of the confinement; and (4) the confinement was unlawful. *Hiber v.*

Creditors Collection Serv. of Lincoln County, Inc., 154 Or. App. 408, 413, 961 P.2d 898, *rev. denied*, 327 Or. 621, 971 P.2d 413 (1998). Confinement may be created through actual force or through threats, which may be by conduct or words. *Lukas v. J.C. Penney Co.*, 233 Or. 345, 353, 378 P.2d 717 (1963). "If the words or conduct are such as to induce a reasonable apprehension of force and the means of coercion are at hand, a person may be . . . effectively restrained." *Id.*

Here, plaintiff fails to present any evidence creating a genuine issue of material fact that Deputy Alford confined S.G. or intended to do so. First, S.G.'s deposition reveals that Deputy Alford treated S.G. nicely, that he did nothing to scare her, and that she trusted him. Furnanz Aff., Ex. C, pp. 25-26. Deputy Alford also did not take any part in the interview; he simply "sat there in the room."[4] Furnanz Aff., Ex. C, p. 149. Further, plaintiff presents no evidence of any physical contact or coercive behavior on Deputy Alford's part, and his mere presence as a police officer does not create coercion or confinement. *See Florida v. Royer*, 460 U.S. 491, 498 (1983) (stating that a person being identified as a police officer, without more, does not convert an encounter into a "seizure"). Therefore, plaintiff fails to raise a genuine issue of

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[4] Plaintiff argues that Deputy Alford still had a duty to intervene in Camreta's interview to stop the violation of S.G.'s Fourth Amendment rights. However, because there was no violation of S.G.'s constitutional rights, this argument is moot.

material fact that S.G. was falsely imprisoned by Deputy Alford, and plaintiff's false imprisonment claim against Deschutes County on behalf of S.G. is dismissed.

Next, to support S.G.'s claim of IIED, plaintiff must show the following: (1) defendant intentionally inflicted severe emotional distress on S.G.; (2) defendant's actions caused S.G.'s severe emotional distress; and (3) defendant's actions were "an extraordinary transgression of the bounds of socially tolerable conduct." *McGanty v. Staudenraus*, 321 Or. 532, 543, 901 P.2d 841 (1995) (quoting *Sheets v. Knight*, 308 Or. 220, 236, 779 P.2d 1000 (1989)). Socially intolerable conduct is conduct that is "outrageous in the extreme." *Watte v. Edgar Macyens, Jr., M.D., P.C.*, 112 Or. App. 234, 239, 828 P.2d 476 (1992).

Even assuming that S.G. suffered emotional distress, plaintiff fails to raise a genuine issue of material fact suggesting that defendant's actions were socially intolerable. Deputy Alford merely accompanied Camreta during an investigation of possible sexual abuse of S.G., following the arrest of S.G.'s father for sexually abusing another child. Nothing in his actions remotely suggests "an extraordinary transgression of the bounds of socially tolerable conduct." Accordingly, plaintiff's IIED claim against Deschutes County on behalf of S.G. is dismissed.

CONCLUSION

For the reasons set forth above, defendants' Motions for Summary Judgment (docs. 41, 46, 50) are GRANTED, and defendants Deschutes County and Deputy Sheriff James Alford's Motion to Strike (doc. 87) is DENIED as moot. This case is DISMISSED.

IT IS SO ORDERED.

Dated this 23 day of March, 2006.

/s/ Ann Aiken
Ann Aiken
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor, Plaintiff-Appellant, v. BOB CAMRETA; DESCHUTES COUNTY JAMES ALFORD, Deschutes County Sheriff; BEND LAPINE SCHOOL DISTRICT; TERRY FRIESEN, Defendants-Appellees.	No. 06-35333 D.C. No. CV-05-06047-AA District of Oregon, Eugene ORDER (Filed Mar. 1, 2010)

Before: BERZON and BEA, Circuit Judges, and GUTIERREZ,* District Judge.

The panel has unanimously voted to deny appellee's petition for rehearing. Judge Berzon and Judge Bea have voted to deny the petition for rehearing en banc. Judge Gutierrez recommends denial of the petition for rehearing en banc.

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* The Honorable Philip Gutierrez, United States District Court for the Central District of California, sitting by designation.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.